

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al., : Civil Action No.
vs. : 3:14CV852
VIRGINIA STATE BOARD OF ELECTIONS, : January 10, 2019
et al. :

COMPLETE TRANSCRIPT OF THE EVIDENTIARY HEARING

HEARD BEFORE: THE HONORABLE ROBERT E. PAYNE
THE HONORABLE ARENDA L. WRIGHT ALLEN
THE HONORABLE BARBARA MILANO KEENAN

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P R O C E E D I N G S

THE CLERK: Case number 3:14CV852, Golden Bethune-Hill, et al., versus Virginia State Board of Elections, et al. The plaintiffs are represented by James Snyder and Kevin Hamilton. The defendants are represented by Toby Heytens, Stephen Cobb, and Michelle Kallen. The intervenor defendants are represented by Katherine McKnight, Mark Braden, and Richard Raile.

The independent party Virginia State Conference of NAACP Branches is represented by David Prince, Allison Riggs, and Jeff Loperfido. The special master is Dr. Bernard Grofman. Are counsel ready to proceed?

MR. HAMILTON: Ready, Your Honor.

MS. MCKNIGHT: Yes, Your Honor.

JUDGE PAYNE: Good morning. Happy to have you, and we issued an order that allowed the parties to ask questions of the special master before we hear any argument. Does anybody wish to avail themselves of that opportunity? Mr. Hamilton?

MR. HAMILTON: No, Your Honor, although I may have some follow-up questions if there are others who ask questions of the special master, but at this point, no.

JUDGE PAYNE: Ms. McKnight?

MS. MCKNIGHT: Yes, Your Honor, we would.

JUDGE PAYNE: Mr. Heytens?

1 MR. HEYTENS: Not at this time, Your Honor. Again,
2 we may have follow-up questions, but we have none at this time.

3 JUDGE PAYNE: Mr. Prince.

4 MS. RIGGS: On behalf of the NAACP, Your Honor.
5 Allison Riggs.

6 JUDGE PAYNE: Ms. Riggs.

7 MS. RIGGS: Likewise, we'll wait to see if there are
8 any questions instigated by any other parties' questions.

9 JUDGE PAYNE: Mr. Breit? Not here. Dr. Wang. Not
10 here. All right. Let's have Dr. Grofman come to the witness
11 stand and be sworn, and then, Ms. McKnight, you may ask the
12 questions that you have to ask.

13 You can go ahead and set your stuff down up there,
14 Dr. Grofman, get comfortable, and then we will take the oath.
15 And do you need to set up anything in order to answer questions
16 such as a computer?

17 DR. GROFMAN: I don't know the answer to that
18 question, Your Honor, until I hear the questions.

19 JUDGE PAYNE: Well, you are starting off right
20 answering the right way that you don't know the answer to
21 something. If you don't know it, that's great. We'll
22 administer the oath then. Do you swear or affirm?

23 DR. GROFMAN: I swear.
24
25

1 **BERNARD N. GROFMAN,**
2 a witness, called at the instance of the intervenor defendant,
3 having been first duly sworn, testified as follows:
4

5 THE WITNESS: The computer is not yet set up in the
6 event that I would need it, so there would be some time pause
7 if I have to respond by checking something, but otherwise I'm
8 certainly prepared to respond to any questions.

9 JUDGE PAYNE: Let me ask you the most basic question
10 that reveals my ignorance of computers. Can you take care of
11 getting it set up, or do you need our IT people up here to set
12 it up?

13 THE WITNESS: It's simply a question, Your Honor, of
14 a plug.

15 JUDGE PAYNE: Mr. Robinson, can you take care of that
16 and help him with that.

17
18 (Discussion off the record.)
19

20 THE WITNESS: Yes, the commuter is, in fact, set up.

21 JUDGE PAYNE: All right, Mr. Braden, please proceed.
22

23 DIRECT EXAMINATION

24 BY MR. BRADEN:

25 Q Good morning, Dr. Grofman. I have copies, hard copies of

1 all your reports and addendums. I'm happy to provide them to
2 you if that would be more convenient or if you'd want to use
3 your computer.

4 A It might be more convenient for me to have the hard
5 copies. I do have a computer access to all these documents,
6 but there are many, many documents on my computer. Thank you.
7 Thank you, Mr. Braden.

8 THE COURT: Is that volume all right for everybody?
9 It was a little loud up here when we turned it down. Can you
10 hear all right?

11 UNIDENTIFIED SPEAKER: Yes, Your Honor.

12 THE COURT: If you can't, will you let us know,
13 please.

14 Q Well, Dr. Grofman, welcome to cold Virginia, much colder
15 than California. I wanted to start with some questions in
16 regards to your fourth addendum, pages two and three.

17 A Yes, I have the fourth addendum presently in front of me,
18 and, unfortunately, I apparently failed to provide pagination,
19 so I believe I can understand which pages you are referring to
20 in your questions.

21 Q Yeah. I think in the document we gave to you, at the very
22 top of it, there's a page three of five and a page two of five.

23 A Yes.

24 Q At the very top line.

25 A Yes.

1 Q It's -- we sort of prepared this relatively quickly, so
2 I'll apologize. I'm sure when we go through it it will be a
3 little confusing, because we probably didn't streamline it as
4 well as possible.

5 Let me draw your attention to page number three and the
6 first full paragraph which is numbered three. Could you read
7 the last sentence there? I understand it to indicate that you
8 used Maptitude in drawing your plans initially; am I correct?

9 A I used Maptitude throughout. The question was, where did
10 the racial numbers come from. When I drew -- when I looked
11 first at the Virginia redistricting map, I did that on
12 Maptitude, and I entered into that map racial data from the
13 United States census, and the racial data that I entered, as
14 indicated in the paragraph you just referenced, is racial data
15 that is the black voting-age population, solely black, as
16 reported by the United States census.

17 Thereafter, I had access to materials that were provided
18 me by the legislative staff, and in those materials, the coding
19 scheme for how the category black was to be coded was the
20 scheme that the legislature itself used and that has been used
21 in the reports of the legislative staff.

22 As I indicated in an earlier paragraph of that report,
23 that coding scheme is different from simply looking at the
24 proportion of people who report themselves as being of
25 African-American ancestry. Rather the way in which the

1 legislature codes race is the legislature codes African
2 American or black as the category on the census which is the
3 category for African Americans plus the category on the census
4 for those individuals who report a multiracial identity. That
5 multi -- but only among some of the individuals who report a
6 multiracial identity.

7 The racial identity which is multiracial, which is coded
8 as African American by the legislature in its reports, is those
9 individuals who are multiracial in their self-identification on
10 the census who report themselves to be, in racial identity
11 terms, both black and white. Am I clear?

12 Q You are clear, although I'm not sure that was actually the
13 import of my question. I think my question was much simpler.
14 I understood at the beginning that you did, in fact, use
15 Maptitude.

16 A Oh, yes, throughout.

17 JUDGE PAYNE: Excuse me.

18 THE WITNESS: I apologize. I want to be very precise
19 in responding.

20 JUDGE PAYNE: Excuse me, Dr. Grofman. I'm having
21 some difficulty understanding exactly what the reference point
22 is here, and it may be because I have in my mind the record in
23 the *Page* case, but I have a recollection that there was a great
24 debate in the *Page* case about whether or not -- which BVAP
25 figure was actually used by the General Assembly, and it

1 ultimately came out that the BVAP figure actually used by the
2 map-drawers was not the one that included African American and
3 white and Asian but the pure -- that's not the right way to do
4 it. The statistic that the census bureau used that was only
5 African American and that that same data was used subsequently
6 in the -- in *Bethune-Hill* in the redistricting here.

7 Can counsel help set the stage on this as to your
8 understanding? I have to tell you, I'm quite confused about
9 it, and I want to make sure we are proceeding on the same page
10 as to what the General Assembly actually did use.

11 MR. BRADEN: Yes. I believe the testimony of the
12 drafters of the plan, which were John Morgan under the
13 direction of Delegate Jones, their testimony was that they used
14 Maptitude to draw the plan and that they used the data which
15 appears in the first column here, not surprisingly the same
16 data that the doctor used.

17 JUDGE PAYNE: Which is it? Is it the census data --

18 MR. BRADEN: It's the census data that simply is the
19 -- he described --

20 JUDGE PAYNE: That's your understanding.

21 MR. BRADEN: That's my understanding. That's his
22 testimony as to what occurred. The numbers in the first
23 column --

24 JUDGE PAYNE: Wait a minute. Let's stop there. Mr.
25 Hamilton, do you agree with that record or not?

1 MR. HAMILTON: I'm not sure I completely understand
2 what Mr. Braden is saying. If I can just quote from the
3 Court's opinion.

4 JUDGE PAYNE: In what?

5 MR. HAMILTON: Docket 108, the Court's first opinion
6 in Bethune-Hill, page 23 to 24 addressed this issue, and the
7 Court said, "At trial, two additional questions regarding the
8 55 percent figure dominated the discussion. First, whether the
9 BVAP figure included or excluded those who identified
10 themselves in the census process as ethnically Hispanic and
11 racially black.

12 "The parties hotly debated whether the appropriate
13 measure of BVAP used in the redistricting process did or did
14 not include the individuals who identified as racially black
15 and ethnically Hispanic in the census data." That's from the
16 Court's opinion, page 23 and 24.

17 JUDGE PAYNE: Whoever wrote that didn't resolve the
18 issue then, did they?

19 MR. HAMILTON: Well, it ultimately became irrelevant,
20 because Delegate Jones testified that it wasn't important
21 enough. You will recall that Judge Lee asked, "Was there a
22 reason you did not mention on the floor the difference between
23 DLS 55 and DOJ black," and Delegate Jones testified, "Well, I
24 felt that it wasn't that big -- it was between .1 percent
25 difference or .4 or maybe .3, if I recall, Your Honor, so I

1 don't think it was statistically significant."

2 So the number, the appropriate number, I think, is
3 the DOJ census number, but, ultimately, I think the Court
4 concluded it didn't matter.

5 JUDGE PAYNE: All right, thank you. Sorry to
6 interrupt.

7 MR. BRADEN: Sure. Your Honor, I'll go through it in
8 some detail, but it does matter, because obviously what's -- we
9 simply believe, based upon Dr. Grofman's report and his
10 testimony, it will become clear to this Court that a mistake
11 was made in his original decision-making on that point. This
12 Court appeared not to find credible the testimony of Morgan --

13 JUDGE PAYNE: Which opinion erred; the first one or
14 the second one?

15 MR. BRADEN: You're right about that. Actually
16 starting with the first opinion and -- where we disputed the
17 issue extensively. It's our view, and I think --

18 JUDGE PAYNE: Why don't you not argue. Just go ahead
19 and ask your questions. Then we'll proceed from there.

20 Q Dr. Grofman, it wouldn't be a surprise to you that an
21 individual tasked with drawing a plan in Virginia would use
22 Maptitude versus some other software?

23 A No, it was not.

24 Q Is Maptitude the sort of standard software that most
25 people use?

1 A Maptitude is the standard software that is used for
2 persons who do not have access to state resources. It varies
3 from state to state what particular computer program is used
4 for map-drawing purposes. A number of states have specialized
5 programs that were created for that state to provide
6 map-drawing capacity along with other geographic information
7 system capacity so that those GIS systems, GIS being shorthand
8 for geographic information systems, that those GIS systems can
9 then have a multipurpose use.

10 So I would say that it really does vary across states, and
11 in particular in Virginia, the legislative staff who are
12 drawing maps do not use Maptitude. Rather they use a program
13 that is called ArcGIS which also is one of the industry
14 standards.

15 Q Let me interrupt you there. Is it true that this plan was
16 initially drawn by the legislative staff, or was it initially
17 drawn by someone else?

18 A I'm sorry, I have no knowledge on that point.

19 Q You haven't read the actual opinion of the Court?

20 A I've read the opinion of the Court, but I have not paid
21 particular attention to the question of which individual or
22 individuals seeks to take credit or blame for the map as it was
23 drawn.

24 Q So you haven't read any of the record, extensive testimony
25 in the record as to --

1 JUDGE PAYNE: Excuse me. Just ask the question.

2 Q You haven't read any of the record, so you're not aware of
3 who drafted the plan.

4 A I have not read any of the record meaning the deposition
5 testimony or the trial testimony, yes, that is correct.

6 Q Okay, let me turn --

7 JUDGE PAYNE: Excuse me just a minute. Dr. Grofman,
8 when you said the legislative staff in Virginia used ArcGIS,
9 were you intending to say that you understood that that was
10 what was used in the drawing of the enacted map here or that
11 that is what they were using when they were dealing with you or
12 something else?

13 THE WITNESS: Thank you very much for that clarifying
14 question, Your Honor. My understanding was that I was being
15 provided by the legislative staff the information used by the
16 legislature.

17 JUDGE PAYNE: All right. That's what you understood.
18 All right.

19 Q So let me go to page two of five which has a little chart.

20 JUDGE PAYNE: We're on the fourth addendum, ECF 342.

21 MR. BRADEN: It shows at the top, page two of five.

22 Q Am I correct these are the -- on the first column is the
23 list of all the challenged districts?

24 A Yes, that is correct.

25 Q And the second column is the black voting-age population?

1 A Yes.

2 Q And that's the numbers you came up initially using the
3 census data and the Maptitude system.

4 A Yes, that is also correct.

5 Q So if someone were to testify in regards to District 69
6 who used the Maptitude system and the census data that
7 District 69, when they drew it, was less than 55 percent black
8 voting-age population, would you find that testimony credible
9 based upon this chart?

10 A I would find that testimony credible only to the extent
11 that there was a rounding. That is to say, the number that you
12 report -- that is reported in that chart is 54.78 percent.
13 Rounded to three significant digits, that would be
14 54.8 percent. Rounded to two significant digits, that would be
15 55 percent.

16 Q Okay. Leaving aside the rounding question which I think
17 we can understand now, let's go to District 71. If someone
18 were to testify, or actually more than someone were to testify
19 that they were using the Maptitude system and the census data
20 and they drew a District 71, and they testified that they
21 believed it to be less than 55 percent voting-age population,
22 would you find that testimony credible?

23 A Again, I will simply repeat, but using the numbers for the
24 district that you have now provided me that in that district,
25 the number that is reported is at 54.87 percent which is to say

1 rounded to three digits would be 54.9 percent which is to say
2 rounded to two digits would be 55 percent.

3 Q So you are rounding up, but, in fact, your chart doesn't
4 round up?

5 A That is correct.

6 Q So a person --

7 JUDGE PAYNE: Excuse me a minute. The chart on page
8 two, percent BVAP, is that your calculation, Dr. Grofman?

9 THE WITNESS: Yes. That is also the calculation that
10 is reported in the very first -- my very first report before I
11 was provided data on race as it is coded by the legislature in
12 the reports that were provided to me by legislative staff.

13 JUDGE PAYNE: And what is WBVAP?

14 THE WITNESS: That would be the black proportion as
15 defined by adding those who indicate race solely African
16 American plus those whose racial identity is multiracial but
17 only some of those whose racial identity is multiracial, namely
18 those multiracial identifying individuals who list themselves
19 as being both white and black.

20 JUDGE PAYNE: Was that figure used or not used by the
21 General Assembly, according to your understanding, in effecting
22 the enacted map?

23 THE WITNESS: I had thought, perhaps wrongly, that
24 that was, in fact, the number which was used by the General
25 Assembly in part because the defendant intervenors noted the

1 fact that the system which I was using to define race was
2 different in the report of November -- December 7th, rather,
3 between how I reported the racial numbers for the enacted map
4 and how I reported the racial numbers for all other remedial
5 maps and all other illustrative maps.

6 JUDGE PAYNE: Counsel, do you agree that the WBVAP
7 figures are what is referred to in the trial record as DOJ
8 black?

9 MR. BRADEN: No, I don't believe that is, in fact,
10 DOJ black.

11 JUDGE PAYNE: You believe this is not --

12 MR. BRADEN: No. I believe -- here's --

13 JUDGE PAYNE: What do you think it is?

14 MR. BRADEN: I think that it's just what Bernie
15 described it as. I think what we have here is exactly what
16 happened to Delegate Jones. His first report comes up to
17 exactly what Delegate Jones testified to. When he drew the
18 plan on Maptitude, he came up with the numbers in the first
19 column. He said then he was surprised when he went over to
20 Legislative Services and they put it in a bill form and it came
21 up with the second column.

22 So all this is about simply pointing out to the Court
23 the fact that they didn't find Jones' testimony credible when
24 he said, no, I didn't have a floor, I did, in fact, draw three
25 districts --

1 JUDGE PAYNE: I understand. Go ahead.

2 MR. BRADEN: -- were less than 55 percent.

3 JUDGE PAYNE: Give Mr. --

4 MR. BRADEN: Is exactly his analysis of the numbers
5 initially until he went to the legislature and found out that
6 they used different numbers.

7 MR. HAMILTON: I object at this point. This is
8 argument, not questioning of the witness.

9 JUDGE PAYNE: No, it's not questioning of the
10 witness, but he was responding to me, and I think that's fair
11 comment, but you have your opportunity.

12 MR. HAMILTON: I also --

13 JUDGE PAYNE: Sometimes judges wish they hadn't asked
14 questions, but then we move on. Mr. Braden, go ahead.

15 MR. BRADEN: Why don't we move on. I hope that that
16 point is clear. I think the shortcoming may well have been of
17 counsel in the first case that we didn't present it as clearly
18 as we should have to the Court, and that's the reason for the
19 confusion.

20 Q Let me move to page 22 of your first report, and it shows
21 at the top 22 of 131.

22 A Yes, I am now on that page.

23 JUDGE PAYNE: Pagination, are you using his
24 pagination or the file pagination?

25 MR. BRADEN: In this case, they happen to conform,

1 but that is only by accident. There's 22 at the top here and
2 22 on the page, too. Again, I apologize. We put these
3 together, and the pagination kind of varies back and forth, and
4 I apologize for that.

5 Q Am I correct that this is the page where you talk about
6 narrowly tailoring the remedy? I know you talk about it in
7 other places but principally here.

8 A Yes. This is on pages 22, continuing on to page 23.
9 These are the -- these are the paragraphs that specifically
10 refer to narrowly tailoring, but there are also other aspects,
11 of course, as you point out, of narrow tailoring that are
12 described in the subsequent pages.

13 Q Is that a concept that would -- is that like a least
14 change concept? How would you describe that, or is that
15 unfair?

16 A Narrow tailoring, at least as I have used it in my
17 reports, I've used it consistently to refer to a situation in
18 which one begins with the constitutional infirmities and seeks
19 to remedy those constitutional infirmities in a way that has
20 the least impact on the fewest districts. So the infirmities
21 are fully remedied, but the consequences to the legislative
22 plan as enacted in terms of the number of districts in that
23 plan that were changed is reduced to the extent feasible given
24 the fact that there are competing trade-offs as to the criteria
25 that would be appropriate for a Court-ordered map, and those

1 trade-offs, as I have been very clear throughout the reports
2 that I've prepared, that ultimately my task, as I saw it, was
3 to provide to the Court options, and then the ultimate question
4 of the balancing off of trade-offs among competing criteria or
5 possibly among competing definitions of what constitutes a
6 narrowly drawn plan would, of course, be those made by the
7 Court.

8 Q So would it be safe to characterize narrowly tailored
9 being focused on the concept of changing the fewest number of
10 districts?

11 A I would say that narrowly tailored is focused on the
12 concept of changing the fewest districts that can be changed
13 provided that the constitutional infirmities are fully remedied
14 and provided that a variety of other criteria specified in my
15 report have been satisfied.

16 Q Are you familiar with a term I believe that's commonly
17 used in redistricting called core retention?

18 A Yes.

19 Q And could you tell the Court what that is?

20 A Core retention refers to the degree to which a district's
21 population has been retained as one moves from one
22 redistricting plan to another. Essentially, it involves an
23 overlap, or overlay I should say, of one map on another map to
24 alternative maps for a jurisdiction and a comparison of the
25 population in the initially drawn map with the population in

1 the redrawn map in that same district to see what proportion of
2 the initial district has, in fact, been retained in population
3 terms in the redrawn district of the same number.

4 Q And are statistics commonly available? In other words,
5 could you create a series of statistical tables showing that?

6 A Yes.

7 Q And did you create any of those for this?

8 A No.

9 Q Why focus on number of districts rather than what I assume
10 to have been more important, the number of people moved around?

11 A The number of districts affects the degree to which those
12 incumbents in place and those districts now existing can see
13 their district changed. The population is necessarily going to
14 be moved when you remedy unconstitutional infirmities, and my
15 focus was on remedying the unconstitutional infirmities, and
16 insofar as there were population shifts that took place in
17 adjacent districts, that was done solely for purposes of
18 remedying the constitutional infirmities.

19 Q I guess I'm a little bit confused. Couldn't people
20 logically assume when you are looking at least changes one was
21 talking about either the number of people moved between
22 districts or maybe the number of geography or the number of
23 VTDs moved rather than simply a question of number of
24 districts?

25 A This is an unusual case in that alternative maps that were

1 provided to the Court by parties to the case varied in the
2 number of districts in the enacted map which they changed.
3 That number ranged from 30 in, I believe, two of the maps to a
4 high of 33 in one of the maps that were submitted as remedial
5 maps to the Court.

6 This suggested to me that there was a need to address the
7 question of how many districts actually needed to be changed in
8 order to remedy the constitutional infirmity. I began in my
9 very exploratory -- I'm sorry if I'm giving too long an answer
10 to this question, but to clarify, I began in my exploratory
11 analyses to look to see what would happen if one were redrawing
12 33 adjacent districts. I then noticed after the remedial plans
13 were submitted that other parties to the case saw no need to,
14 in fact, redraw 33 remedial districts.

15 At that point, I began to consider what, in fact, might
16 make sense in the geographic and demographic context of the
17 state of Virginia in terms of looking at configurations of
18 remedial maps which changed fewer than 30, fewer than 33, fewer
19 than 30. At that point, I proceeded in stages, ultimately got
20 to illustrative maps that were provided to the Court.

21 Q Let me see if I can ask a relatively straightforward
22 question. So, at every stage, you were concerned principally
23 about the number of districts changed. You weren't looking at
24 any core retention figures.

25 A Yes, that is essentially correct. However, with, again,

1 clarifying an --

2 JUDGE PAYNE: Dr. Grofman, if somebody wants to get
3 into the clarification, they can. I think you answered the
4 question.

5 THE WITNESS: Certainly. In looking at the degree --

6 JUDGE PAYNE: Go ahead and let the other lawyers
7 cross-examine on that if they want to. Just listen to the
8 question, and answer the question if you can.

9 Q So we're clear, your definition of least changes is
10 focused on the number of districts changed and not core
11 retention which is the notion of how many people got moved
12 around?

13 A Yes, that is essentially correct subject to the various
14 caveats that are, in effect, already stated in my various
15 reports.

16 Q And certainly you don't consider it illegitimate to define
17 or look at these changes in the context of how many people get
18 moved around.

19 A The question of how best to define --

20 JUDGE PAYNE: I think -- ask the question again. I
21 think he wants you to answer yes or no to begin with so he can
22 understand what's going on.

23 Q Is it illegitimate to look at least changes in the context
24 of core retention? Isn't that commonly done by experts?

25 JUDGE PAYNE: Those are two different questions. One

1 is is it illegitimate. The other is is it commonly done, and
2 those don't necessarily mean the same thing. So which one do
3 you want him to answer?

4 Q Let me try the first one as to whether it's illegitimate
5 to use that as a way of doing it.

6 A Illegitimate is a very difficult concept for me to
7 understand. That ultimately is a --

8 Q I was going back to --

9 THE COURT: Let's make sure we do one at a time so
10 the court reporter can hear you both. You let -- Dr. Grofman,
11 let him ask the question, and you make sure, Mr. Braden, to let
12 him finish his answer. Now, start again with -- withdraw the
13 question about illegitimacy and go ahead with another question.

14 Q Do experts in this field commonly use core retention when
15 analyzing plans?

16 A Yes, but, and the "but" is very straightforward. I did
17 not do so when I provided a special master report in, and I
18 will not try to butcher the name of the plaintiff, in *Alcorn*.

19 Q And when drawing a plan, if someone were to focus on the
20 least changes in the concept of moving the fewest people
21 around, that would not be a concept that would be rejected by
22 most expert witnesses; am I correct?

23 A That would depend on the context. If the issue is the
24 unconstitutionality of particular districts and the remedy for
25 that unconstitutionality required population shifts, including

1 considerable population shifts which impacted alternative --
2 sorry, adjacent districts or other districts, then I believe it
3 is fair to say that experts would reject the notion that simply
4 counting population moved would, in fact, be an appropriate way
5 to determine whether or not a particular remedial plan had or
6 had not addressed the question of a remedy which was narrowly
7 tailored.

8 Q Okay. I guess I was leaving aside the question whether --
9 just the question of whether narrowly tailoring in the concept
10 of core retention and go back to the --

11 JUDGE PAYNE: Wait a minute. That's not a question.
12 That's a reflection of what you had in mind, so if you want to
13 ask a question, go ahead and do it.

14 Q Let me move on. The question of moving the fewest VTDs,
15 precincts, would that also be another way to look at the notion
16 of core retention and narrowly tailoring?

17 A VTDs, as I indicated, are administrative units. They
18 change as new plans are built.

19 JUDGE PAYNE: Dr. Grofman, let's go back, have the
20 question again, and if you don't mind yes or no --

21 THE WITNESS: I will try to, Your Honor. I
22 apologize, but these are questions which are conceptually
23 tricky, because the answer to that -- if I have to give a short
24 answer, the answer would be no because I do not believe that
25 would be an appropriate way to measure things. But I would

1 have to clarify that to be clear as to what I meant and why.

2 JUDGE PAYNE: That's all right. Go ahead.

3 Q Let's move on, and am I correct that in all of your
4 different plans, all of the challenged districts have
5 voting-age populations of less than 55 percent?

6 JUDGE PAYNE: Black voting age --

7 MR. BRADEN: Black voting-age population --

8 A Yes, that is correct. To the best of my knowledge,
9 given -- please let me clarify. Are you asking specifically
10 about whether if one were to recalculate from the DLS way of
11 representing African-American populations to one in which the
12 African-American population would only be that which was
13 exclusively African-American sole race, that all the numbers in
14 my illustrative modules would be under 55 percent? Is that the
15 question?

16 Q Yes.

17 A Then the answer is yes.

18 Q Is there any other calculation that wouldn't have them all
19 less than 55 percent?

20 A The corrected calculation that is reflected in my fourth
21 addendum shows that there was an error. It literally was a
22 typo because we didn't make the correction. There was a
23 district which was 55.01 percent black under the calculation
24 using the combination of African-American population plus black
25 and white population.

1 Q So that was a typographical error?

2 A The fact that it was reported as below 55 percent
3 initially, yes.

4 Q So you intended it or understood it initially to be less
5 than 55 percent?

6 A Yes, that is correct.

7 JUDGE PAYNE: Excuse me a minute. Are you saying
8 there's a typographical error in the fourth supplement?

9 THE WITNESS: No. There's a typographical error
10 corrected in the fourth supplement.

11 JUDGE PAYNE: For which district?

12 THE WITNESS: I believe it's District 89, Your Honor.
13 I'd have to go double-check. Yes. In one of the three
14 modules, this would be -- I'll call the Court's attention to
15 page five of five using the numbering at the top in my fourth
16 addendum, and you will see that there are two numbers reported
17 on that page which reflect essentially errors on my part,
18 typographical errors on my part.

19 Those typographical errors are shown as reported and
20 correct. Reported means that they were -- those were the
21 numbers that were reported in my third addendum. Correct means
22 that those numbers were incorrect, and the correct numbers are,
23 in fact, shown.

24 So, for example, if you will look at Norfolk 1A, the
25 number that is reported for Norfolk 1A is 54.92 percent, but

1 the correct number is 54.95 percent. This is District 89.
2 Similarly, if we look at Norfolk 1B in District 89, the
3 reported numbers is 54.92 percent. The corrected number is
4 54.95 percent. Those numbers do not effectively change whether
5 a district was or was not to be reported above or below
6 55 percent.

7 When one comes, however, to Norfolk 1C, the third of
8 the illustrative models that I prepared for the Court, then one
9 notices that the reported number is 54.98 percent, a shade
10 under 55, and the corrected number is 55.01 percent.

11 JUDGE PAYNE: If you look at page two of the report
12 and the chart there that relates to 89, District 89, and page
13 5-5 of the fourth addendum that relates to the correction that
14 starts the -- the text of which starts on the preceding page,
15 the figure 54.98 percent and 55.01 -- excuse me. I don't see
16 how -- what figure you are talking about out of Norfolk 1A, 1B,
17 1C in the charts on page five in the chart that appears on page
18 two as to District 89. Page two has 54.98 percent. Are you
19 saying that that's wrong?

20 THE WITNESS: One of these charts -- the chart that
21 is on page two, Your Honor, is for the enacted map. The chart
22 that is on page five is for three of my illustrative modules,
23 so, therefore, of course, the numbers that are reflected for
24 the various districts don't match between the enacted map and
25 the illustrative modules.

1 JUDGE PAYNE: That brings me to another question. Is
2 there in any of the reports by anybody a chart that shows the
3 BVAP for the enacted map for the options that are put out in
4 your report or the 11 districts and for all other affected
5 districts?

6 THE WITNESS: There is not a single chart, Your
7 Honor, to the best of my knowledge, which simply lists the 11.
8 There are, however, charts provided which, for each of the four
9 regions, do provide that information both for the enacted map
10 and for the illustrative modules. So those comparisons can be
11 made from the information that has been provided to the Court.

12 JUDGE PAYNE: Excuse me for interrupting you.

13 Q Can we go to your original report, page 68. There's a
14 sentence in the middle. There's a partial --

15 JUDGE PAYNE: Let him get there. Again, we're
16 looking at the numbers at the bottom of the page.

17 MR. BRADEN: Yes.

18 A Yes, I have found that page.

19 Q There's a partial paragraph and then one, two, three,
20 four, five, six lines up from the end of that paragraph,
21 there's a sentence that begins, "None contain any districts
22 with more than 55 percent black voting-age population." Do you
23 see that sentence?

24 A Yes.

25 Q And that's your representation that none of the districts

1 contain black voting-age population greater than 55 percent?

2 A That appears to be an error, and I do not -- I apologize
3 to the Court and to you, because at least it shows on that
4 particular chart a statement which is inconsistent with the
5 statement in the paragraph on the previous page, because it
6 shows that in that version --

7 JUDGE PAYNE: Excuse me a second. Which chart are
8 you talking about that is inconsistent with the text that he
9 read?

10 THE WITNESS: The chart that is on page 69 shows a
11 district which is 55.98 percent black voting-age population in
12 -- I'm sorry. That's in the enacted map. Let me look again at
13 the other modules. I'm sorry. It will take me a moment, Your
14 Honor, to scroll through to see whether there is, in fact, an
15 inconsistency. I'm sorry, I do not see the inconsistency to
16 which you are referring.

17 JUDGE PAYNE: Does that mean that you are retracting
18 the statement that the sentence "None contain any districts
19 with more than the 55 percent black voting-age population" is
20 an erroneous statement?

21 THE WITNESS: No, I don't believe that's -- I believe
22 that statement remains correct. The only reason -- apologies,
23 Your Honor. The only reason I initially got confused was that
24 I was looking not at the illustrative modules that I had
25 prepared but rather at the enacted map, and in the enacted map

1 there is, indeed, a district which is above 55 percent.

2 Q I was probably confusing in my question. I was not
3 seeking to confirm or show any inconsistency, and, in fact, the
4 question was to show that you've been consistent. Am I not
5 correct that basically this sentence, maybe the exact sentence
6 appears in reference to each one of your modules?

7 A Yes, that is correct.

8 Q So, clearly, your intent was that no district would be
9 over 55 percent.

10 A No, that is incorrect.

11 Q So that happened by accident?

12 A It did not happen by accident. It happened by the
13 geography and demography of the state of Virginia.

14 Q Were there any other plans submitted by any party that
15 didn't have districts of more than 55 percent?

16 A There were several plans submitted which had exactly one
17 district which was above 55 percent. There were -- there was
18 also one plan which had seven districts which were at or above
19 55 percent using the DLS numbers and still, I believe, four
20 districts at or above 55 percent using simply racial categories
21 of black and black only, and that, of course, would be, as you
22 are aware, defendant intervenor map 702.

23 Q So can we go to your report, page 122.

24 A Yes, I am now on that page.

25 Q I'm going to actually tell you that it's -- it should be

1 page 120. I referred to the wrong page.

2 A I'm now on page 120 which is consistent numbering both for
3 the fax and for the page numbering that I used.

4 Q Look at the last paragraph on page 120 that goes over to
5 page 122, and it seems to me reading that paragraph that you
6 are expressly rejecting a group of plans because they have
7 voting-age populations of greater -- and it seems every plan
8 you are rejecting it says in which any redrawn plan exceeds
9 55 percent of the black voting-age population that you are
10 rejecting those as because of that fact. Am I reading that
11 incorrectly?

12 A No, you are reading that sentence correctly, but, of
13 course, that sentence is only one of a variety of points that I
14 made as to the reasons why individual plans were being
15 rejected. There were other reasons specified at some length in
16 the appendix to my first report which indicated why I believed
17 that I could not recommend any of the submitted plans to the
18 Court, and those reasons would have led me to the same
19 conclusion even were it not the case that a plan had one
20 district above a 55 percent black voting-age population,
21 because in the multiple of variance of map configurations that
22 I had drawn for the state of Virginia in seeking to draw a
23 remedial plan for the unconstitutional districts, I have never,
24 ever drawn a map which had more than, at most, one district
25 using the legislative's staff definition of race that was, in

1 fact, above 55 percent black, and that district hit
2 55.01 percent black.

3 Q Of course, everyone else who drew plans, submitted plans
4 that were more than 55 percent, so can you reconcile those two?

5 A I can reconcile those facts by saying that there are
6 multiple ways to draw plans for the state of Virginia. Those
7 plans which were drawn that had one district above 55 percent
8 black, narrowly above 55 percent black, may have occurred with
9 no intent to do so, may have occurred simply by virtue of the
10 racial geography.

11 However, once one moves beyond the situation in which
12 there is a single district above 55 percent black, it is my
13 view that such a district configuration of all the
14 unconstitutional districts is simply not going to occur by
15 following traditional districting criteria and seeking to draw
16 a map which provides minorities, the African-American community
17 in particular, an equal opportunity to elect candidates of
18 choice.

19 Q Okay. Let's take an example of that, and let's look at
20 district number 92. We've created a binder book that has some
21 maps in it which, I believe, we've provided to the Court, and
22 if I could, I believe it would be useful if we could provide it
23 to -- I believe we provided it to all the parties, and if I
24 can, if I could approach or ask the bailiff to provide Dr.
25 Grofman with it. These are just map representations. I --

1 JUDGE PAYNE: Do you have copies for the judges?

2 MS. McKNIGHT: Yes, Your Honor. These are copies
3 that were sent to judges' chambers over the past few days.

4 JUDGE PAYNE: But I think we may have one shortage up
5 here. Does anybody have one extra? You have just ceded the
6 right to that property if you don't -- at least temporarily.
7 If you want it back, you have to let us know.

8 MS. McKNIGHT: Please, take it, a gift.

9 JUDGE PAYNE: All right. We all have before us
10 defendant intervenors' hearing binder now, and you can proceed,
11 Mr. Braden.

12 Q If you could turn -- have we given one to you?

13 A No.

14 JUDGE PAYNE: I think his is the most important one.

15 MR. BRADEN: My apologies.

16 JUDGE PAYNE: Do you have one for Dr. Grofman?

17 THE WITNESS: Thank you very much. Give me a moment
18 to get accustomed to the exhibit numbering system that is used
19 in this folder, because there are lots of tabs.

20 MR. BRADEN: Good luck. It confuses me, too, and I
21 did it, or worked on it.

22 THE WITNESS: Basically we have a variety of lettered
23 tabs, and then we have some numbered tabs.

24 JUDGE PAYNE: What is it you're referring him to?

25 MR. BRADEN: Exhibit B.

1 JUDGE PAYNE: E?

2 MR. BRADEN: B as in baker.

3 JUDGE PAYNE: About the third one down, Dr. Grofman.

4 MR. BRADEN: It's the last group of letters. It's
5 Exhibit B, and we'll be looking at page 21 of 24 as a starting
6 point.

7 JUDGE PAYNE: For the record, Exhibit B in my copy is
8 a declaration of S. Chris Jones. Is that what you're talking
9 about?

10 MR. BRADEN: No. Again, I apologize. This goes back
11 to -- the heading tab is --

12 JUDGE PAYNE: Excuse me. There's a second Exhibit B,
13 and that's in the back.

14 MR. BRADEN: Yes.

15 JUDGE PAYNE: And that is a map.

16 MR. BRADEN: Yes, Your Honor.

17 JUDGE PAYNE: Do you see it, Dr. Grofman?

18 THE WITNESS: Actually, I had not. That's why I
19 noticed that there were multiple letter iterations here. Let
20 me see if I can find the map.

21 JUDGE PAYNE: It looks like this, Dr. Grofman. More
22 than halfway toward the back is a whole other set of tabs in A,
23 B, C, and D and E and F and G, and we're on tab Exhibit B.

24 MR. BRADEN: Yes. There's a number four, and there's
25 a docket 337-1-04-19.

1 THE WITNESS: What I see is docket 337, so I believe
2 I'm -- I believe I am on the document that you are referring
3 to, sir.

4 Q And it has some maps which I think --

5 JUDGE PAYNE: Hold on a minute. I'm not sure I've
6 got the right thing here.

7 MR. BRADEN: This is the Exhibit B that follows
8 docket number 337-1-04-19.

9 THE WITNESS: Yes, I now am on the map page that you
10 are calling my attention to.

11 Q It is a Maptitude map rendition of Peninsula district HD
12 92.

13 A And is this one of my illustrative modules, or is this the
14 enacted map?

15 Q Well, this is one of your illustrative modules, and the
16 color combinations, for your benefit, I believe, are the same
17 color combinations we used in both the trials which show what
18 was -- appeared in the original enacted plan and what was taken
19 in and out. It follows the same color scheme we used in the
20 original two trials.

21 JUDGE ALLEN: What page is it?

22 MR. BRADEN: It would be page 24. 21 of 24 at the
23 top. Don't look at the page numbering at the bottom.

24 JUDGE ALLEN: Our page numbers are on the side,
25 right-hand side of the exhibit.

1 THE WITNESS: Apologies, sir. I am now concerned as
2 to what page I should be referencing.

3 JUDGE PAYNE: Are you saying look at the ECF number?

4 MR. BRADEN: Yeah. Look at the number at the top
5 where it says page 21 of 24.

6 JUDGE PAYNE: Did you find it, Dr. Grofman?

7 THE WITNESS: Actually, no, Your Honor, I did not.

8 JUDGE PAYNE: If you go toward the back, as I
9 understand it -- you help me -- there's a tab that says four,
10 and then it says docket 337-1-04-19. Then there are exhibit
11 labels under that, and the next tab -- the tab that you are
12 looking at is Exhibit B; is that right, Mr. Braden?

13 MR. BRADEN: Yes.

14 JUDGE PAYNE: Then you want page 21 of 24 in Exhibit
15 B; is that right?

16 THE WITNESS: There doesn't appear to be a page 21 of
17 24 in Exhibit B, Your Honor.

18 JUDGE PAYNE: Walk over there and show it to him. I
19 think it would be easier.

20 THE WITNESS: Yes, I now have before me the page with
21 the map that you are referring to.

22 MR. BRADEN: Sorry, and I apologize. I know the
23 numbering is confusing. We were scrambling a little bit.

24 JUDGE PAYNE: Just so the record is correct, it's ECF
25 337-2, and we're on page 21 of 24 of that exhibit looking at

1 the ECF numbers at the top. At the bottom there is a number of
2 20; is that right?

3 MR. BRADEN: Correct, Your Honor.

4 JUDGE PAYNE: Now we have the record straight as to
5 what we're talking about.

6 Q Dr. Grofman, do you recognize what area of the state this
7 is?

8 A Yes.

9 Q And could you tell us what that is?

10 A That would be the peninsula area.

11 Q And specifically what part of the peninsula is looked at
12 in this?

13 A I believe we are presently looking at Hampton. Let me
14 double check my geography to make sure, because there doesn't
15 seem to be a county label that I can recognize on this, but I
16 believe that's what we're looking at.

17 Q I think there's a little reference to Hampton city here.
18 Let me explain to you the color scheme here. There's a
19 little -- the reason why we're using this is this is the color
20 scheme we used in the prior litigation simply to illustrate
21 differences, and the red would be parts that were dropped from
22 the enacted plan, your remedial plan. The yellow would be the
23 carryover, and the green would be the new. Does that make
24 sense to you?

25 A Yes, it does.

1 Q And it would appear that you essentially break out part of
2 Hampton city, Hampton city, to create your new district and
3 assign that part to 91; is that correct?

4 A It appears to be correct, yes.

5 Q And 91 just is -- if we look at page 20 above it, do you
6 understand that to be an illustration of District 91?

7 A This is a comparison of the changes -- from enacted
8 District 91 to the module?

9 Q Yes.

10 A Yes, I understand.

11 Q Your new District 91 would appear not to be contiguous; am
12 I incorrect?

13 A As I indicated in my report, the answer to that depends on
14 Virginia state law, and I will defer to the Court on that
15 question. In my -- as defined in my report, the answer to that
16 question is, yes, it is contiguous because of the way in which
17 the census defines census blocks.

18 Q Do you know whether there's a road or any transportation
19 between these two sections other than going outside?

20 A Yes. The issue of contiguity has -- came up also in the
21 2015 case --

22 JUDGE PAYNE: The question is, is there a road there.
23 Is that the question?

24 MR. BRADEN: Yes. It's a pretty simple question.

25 Q Is there some way to get between these two sections other

1 than being a very strong swimmer?

2 A No, there is not, that I'm aware of. I do not see a
3 map -- I do not see a bridge shown.

4 JUDGE PAYNE: In other words, number 91 is not
5 geographically contiguous, but it's contiguous because of the
6 definition of the census; is that right?

7 THE WITNESS: Yes, that is correct, Your Honor.

8 JUDGE PAYNE: And what definition is that?

9 THE WITNESS: That definition is that when the census
10 blocks as they're defined by the census create contiguity that
11 the district is contiguous. Census blocks include water areas.

12 JUDGE PAYNE: Is that a definition that only the
13 United States government could come up with?

14 THE WITNESS: That's not a question that I'm prepared
15 to answer, Your Honor.

16 JUDGE PAYNE: Your objection is sustained.

17 Q Let me start out with the simple question, so why drop out
18 that section of Hampton -- do you know how long these two parts
19 of the city were in the same district?

20 A No, I do not.

21 Q Why did you divide up Hampton city in this manner? Why
22 did you break the piece off and put it into this southern piece
23 of 91?

24 A I was not intending to split off any particular part of
25 Hampton. I was intending in the Peninsula map to do two

1 things. One was to provide a district that was wholly within
2 Hampton that, in my view, remedied the constitutional
3 infirmity.

4 The second was to provide a district which was wholly
5 within Newport News that remedied the constitutional infirmity,
6 and in the process of achieving those two desirable goals as I
7 saw them, the district configuration, once I had drawn both
8 92 -- both 95, then that required changes in 92, and those, in
9 turn, required changes in 91.

10 Q And did you believe the constitutional infirmity was that
11 the district was more than 55 percent voting age black?

12 A I believe that the constitutional infirmity was that the
13 district did not reflect the underlying geography as I
14 understood it in that it was my view that one did not
15 necessarily create an overwhelmingly heavily black district in
16 that area simply due to the racial geography.

17 Q So you made a conscious decision to move out part of the
18 black population?

19 A No, I did not. I simply decided to draw one district
20 wholly in Newport News and one district wholly in Hampton, and
21 then those lines emerged, at least in one but not all of the
22 maps that I drew, in the way shown in the map that you have
23 designated for me on page 20.

24 JUDGE PAYNE: Pardon me, Mr. Braden. In the two
25 pages we're talking about, page 21 of 24, the red is called

1 Hampton city, but is that only part of Hampton -- what actually
2 is Hampton city?

3 THE WITNESS: I'm sorry, I do not know, Your Honor.

4 JUDGE PAYNE: So in page 20 of 24, the same piece is
5 in green. Do we have anything in the record as to whether or
6 not Hampton city is larger than just the green? Is that in the
7 record?

8 MR. BRADEN: Yes, I believe it is, Your Honor. I
9 think that we have an extensive record describing this
10 district. I actually think the Court's original opinion
11 thought the original 92 district was a perfect example of
12 drawing a district compatible with traditional redistricting
13 criteria.

14 JUDGE PAYNE: I guess the question is, if you look at
15 this map and page 20 of Exhibit B, which is 377-2, is the city
16 of Hampton the green and yellow on the right-hand side?

17 MR. BRADEN: Your Honor, we will be able to go to the
18 record and identify those maps in the record or supplement,
19 although I don't think we will need to supplement, a map that
20 would show exactly the lines.

21 JUDGE PAYNE: My knowledge, personal experience is
22 that the red and the green parts respectively on these maps is
23 not all of Hampton city, and one of your questions was, did you
24 deliberately split Hampton city, and I think the answer -- I'd
25 like to know the answer. In making the decision, did you or

1 did you not deliberately split the city of Hampton?

2 THE WITNESS: No, I did not deliberately split the
3 city of Hampton.

4 Q Did you split the city of Hampton?

5 A It appears that I did from the map that you have shown
6 assuming that I have in front of me the actual configuration of
7 the city, because I don't see on this map the city boundaries.

8 JUDGE PAYNE: Why did you split it, I guess, is the
9 next question.

10 THE WITNESS: I think the only way I can respond to
11 that, Your Honor, is --

12 MR. HAMILTON: I would object to the Court's
13 question, because the witness doesn't have a map showing the
14 actual city boundaries, and so he's not certain he actually
15 split it.

16 JUDGE PAYNE: I thought he answered Mr. Braden that
17 he did split the city, he just didn't know exactly how much of
18 it. Did you --

19 THE WITNESS: Insofar as I relied on Mr. Braden's
20 characterization of where the city is, then I would say that I
21 split it. If I -- I did not do so intentionally, Your Honor,
22 nor do I presently know the boundaries of that city except
23 insofar as Mr. Braden has referred to them.

24 JUDGE PAYNE: Let's assume for the moment that it was
25 split. Why was it split? Why was the city of Hampton split at

1 all?

2 THE WITNESS: I honestly do not know a specific
3 answer to that question other than to reiterate that it was not
4 split for racial purposes.

5 JUDGE PAYNE: At the break, you all agree what the
6 boundaries of the city are, please.

7 MR. BRADEN: Yes, Your Honor. I believe we have, and
8 I don't have the exhibit numbers, but we can --

9 JUDGE PAYNE: Go ahead. You can do it later. Go
10 ahead with your questions.

11 Q Do you know the racial composition of the red part that
12 you took out?

13 A No, I do not.

14 Q And the green part that you put in?

15 A No, I do not.

16 Q Let me turn to page 13 of 14.

17 JUDGE PAYNE: Of the same exhibit?

18 MR. BRADEN: Of the same exhibit.

19 THE WITNESS: Yes, I am now on that page.

20 Q And do you recognize what type of map this is?

21 A This is, I believe, is a map of one of my illustrative
22 modules with comparisons to the enacted map. I believe that is
23 correct.

24 Q Do you recognize that it's color-coded by black voting-age
25 population?

1 A No, I do not. I do not -- I am not sufficiently
2 familiar --

3 JUDGE PAYNE: Are you talking about page 13 or 14?

4 MR. BRADEN: I'm talking about page 13 of Exhibit D,
5 like dog.

6 THE COURT: We're not on the same document then.

7 MR. BRADEN: I am afraid that's correct. This goes
8 back -- instead of Exhibit B, we're now at Exhibit D, like dog.
9 Sorry.

10 JUDGE PAYNE: And that is ECF 337-4; is that correct?

11 MR. BRADEN: Yes.

12 JUDGE PAYNE: And we're on page 13 of that exhibit.

13 THE WITNESS: I am now to be in Exhibit D; is that
14 correct?

15 Q Yes, Exhibit D, page 13 of 14.

16 A We're now in Richmond?

17 Q No, no, no. This is Exhibit D, dog, page 13 of 14. It's
18 Newport News. It's a racial map of the same map we've been
19 looking at simply in a racial representation.

20 A Yes. I am now on that page.

21 Q Now that I've hopefully unconfused the record, do you
22 recognize this map, that it's what it is?

23 A Yes. Apparently it appears to be, and I assume correctly,
24 a map reporting black voting-age population by census block for
25 the peninsula area in the area around District 92.

1 Q And so if you look at this map, am I correct or would it
2 be a fair characterization to say that the eastern boundary of
3 District 92 seems to divide up a black community in Hampton
4 city, large black community, heavily black community, divides
5 it in half or so?

6 JUDGE PAYNE: That's about a combination of three
7 questions. Can you kind of get it down to one?

8 MR. BRADEN: Sure.

9 Q Do you recognize the line going through Hampton city for
10 District 92?

11 A Yes, I recognize the line going through what you are
12 characterizing as Hampton city and which characterization I
13 will accept, and you are correct that in that line, there is a
14 black, heavily black area on the left-hand western side of that
15 line, and there is a heavily black area on the eastern side of
16 that line.

17 Q And so you are testifying there was no conscious effort
18 here to move the black population from the one district to the
19 other?

20 A Yes, that is exactly correct.

21 Q And that your, to use your terminology, is a -- 92 is a
22 naturally occurring district?

23 A Insofar as I was looking at maps based on census block
24 data, yes, that is indeed correct.

25 Q 91 is a naturally occurring district?

1 A Insofar as I was examining maps using census block data
2 which show not the water boundaries but rather show census
3 blocks, that map is, indeed, something which is naturally
4 occurring, at least in my view.

5 Q Do you know what the black population is of Hampton city?

6 A Not off the top of my head.

7 Q Do you know whether the city's -- I'm assuming you also
8 don't know whether or not the total population of the city is
9 larger than the district?

10 A I believe it must be, because it is not confined to a
11 single district. There is a district which is entirely within
12 Hampton, and I believe that there is a portion of a district
13 which is only partly in Hampton. So by definition or
14 mathematical logic, it must be the case that the Hampton
15 population is larger than necessary for a single district.

16 Q And, again, maybe I asked this. You don't know what the
17 black population of Hampton -- what the percentage is?

18 A I do not as I am presently sitting here on the witness
19 stand, no. Did I at some point know? Yes.

20 Q And looking at our exhibit on page 13 of 14, it would
21 appear on that representation -- am I correct? -- that it's a
22 heavily black city?

23 A Assuming that we have the city configuration, yes, the
24 answer would be that if the heavily black area to the west of
25 the line and heavily black city to the right of the district

1 boundary line are both within the city, that it would be a
2 heavily black city.

3 JUDGE PAYNE: I'm not sure what lines you are talking
4 about. There's a line to the right which separates District 92
5 and 91, and to the east and west of that line, there appears to
6 be a very heavy area of black population, black voting-age
7 population. Then there's another line on the left-hand side of
8 the District 92 which separates 92 from 95, and it, too, has,
9 east and west of the line, heavy black voting-age populations.
10 Am I reading that correctly?

11 THE WITNESS: Yes, Your Honor, you are.

12 JUDGE PAYNE: And do we know whether or not -- can
13 anybody tell us how far Hampton city extends toward the left
14 part of the page? Does anybody know that? You know -- you
15 don't know it, Dr. Grofman?

16 THE WITNESS: No, I do not, sir.

17 JUDGE PAYNE: That's something you all need to focus
18 on, Mr. Braden.

19 MR. BRADEN: Your Honor, we can certainly supplement
20 the record and overlay a municipal map. We have those in the
21 record. I just don't know where they are.

22 JUDGE PAYNE: You can find them at the break.

23 Q So let me go to Exhibit C which is on page two of two,
24 Exhibit C, and it's document 337-3.

25 A Yes, I am now on that page.

1 Q And, again, just familiarize yourself. I think the Court
2 is familiar. The green portion -- the yellow portion is the
3 existing enacted plan. The red portion is the portion that's
4 dropped out, the green portion is the portion that's been
5 added.

6 A Yes.

7 JUDGE PAYNE: Well, the yellow portion is the part
8 that is common to both plans. The yellow and the red was the
9 enacted; is that correct?

10 MR. BRADEN: This is the comparison to -- sorry.

11 Q This is the comparison to 7002 or the proposals from the
12 plaintiffs. Sorry. I'm confused by my own Exhibit. 7002, not
13 to the enacted plan just to show the difference between our
14 proposal and your proposal?

15 A Yes, I see the red, green, and yellow areas to which you
16 are referring.

17 Q And if you look at your enacted plan, do you see the
18 heading of Chesterfield? It's right at the top in the -- above
19 where the red --

20 A I see the heading to which you are referring, sir.

21 Q Do you know what that's in reference to?

22 A I believe that would be a county.

23 Q So if you look at Exhibit D, dog --

24 A Yes.

25 Q -- and you look at page three of 14, do you recognize what

1 that map is?

2 A Where are we?

3 Q Page three of 14, Exhibit D, like dog.

4 JUDGE PAYNE: That's 337-4, page what number?

5 MR. BRADEN: Page three of 14.

6 A Yes, I am now on that page.

7 Q And do you recognize on page three district number 63?

8 A Yes.

9 Q And is that one of your proposed districts?

10 A It is one of my illustrative districts, yes.

11 Q And if you look at Chesterfield --

12 A Yes, I see now the heading for Chesterfield.

13 Q Do you know how many Chesterfield VTDs are included, not
14 included in 63?

15 A How many VTDs from Chesterfield? No, I do not know the
16 answer to that question.

17 JUDGE PAYNE: The question is, from the county of
18 Chesterfield, how many VTDs are included in 63, and your answer
19 is you don't know?

20 THE WITNESS: The answer is I do not know the answer,
21 yes.

22 Q Do you know why -- looking at three of 14, the exhibit, it
23 appears that there's a line going through Chesterfield which
24 seems to carve out the city of Chesterfield -- some VTDs in
25 Chesterfield that are substantially black, according to this

1 map, and place them into 62. Is that accurate?

2 MR. HAMILTON: I object to the question, Your Honor.
3 When he says carve out, it suggests that -- this is a
4 comparison between what Mr. Braden has proposed versus what the
5 special master is proposing. There's no carving out from an
6 adopted map.

7 JUDGE PAYNE: Object to the form of the question?

8 MR. HAMILTON: So I object to the question.

9 JUDGE PAYNE: Sustained. You can rephrase it.

10 Q Do you know why this line was drawn in the manner it was
11 which appears to have different parts of Chesterfield in one
12 district versus the other?

13 A Yes. It was -- this particular configuration, I
14 believe -- this is Petersburg 2 -- if you'll give me a moment.

15 Q This is Petersburg 2.

16 A If you'll give a moment just to check, because there are
17 different Petersburg configurations. Yes, to the best of my
18 recollection, this was done as a modification of plans that I
19 had drawn originally to take into account the location of
20 incumbents in Districts 62 and 66 such that taking into account
21 those incumbent locations required a way of drawing District 63
22 that had to pick up necessary population but had to do so in a
23 way that did not interfere with the avoidance of incumbency
24 pairing.

25 Q Do you know whether this particular geographic area I'm

1 talking about here involved splitting of a VTD?

2 A District 63, that one will take me a moment to respond to.
3 There was a VTD split in the original enacted 2011 map which
4 is, in fact, perpetuated in this map. I'll have to do a quick
5 check to see whether there are any other VTD splits that would
6 be relevant, if you'll just please excuse me for a moment.

7 JUDGE PAYNE: You can have a moment to do that. How
8 much longer do you have? I'm not trying to rush you.

9 MR. BRADEN: Maybe another 15 minutes.

10 JUDGE PAYNE: Why don't we take a recess for
11 20 minutes. The court reporter has right heavy duty here. We
12 will be in recess for 20 minutes.

13

14 (Recess taken.)

15

16 JUDGE PAYNE: Mr. Braden.

17 Q Dr. Grofman, did you conduct a racial block voting
18 analysis before drafting your remedial plan?

19 A Specifically racial block voting analysis, the answer
20 would be no. Again, I apologize, I have to do a but, but I did
21 indeed examine the projected outcomes into the various
22 districts in the illustrative modules in terms of the vote for
23 Mr. Fairfax in, I believe it's 2013, and also the vote for Mr.
24 Obama in 2012.

25 Q So the answer is no, but you looked at some election

1 numbers?

2 A Yes, that is correct.

3 Q So what provides your strong basis in evidence supporting
4 the creation of these majority-minority districts?

5 A The strong basis in evidence is that the combination of
6 the information that I have available to me that was provided
7 to the Court in terms of the likelihood of minority success in
8 choosing a candidate of choice within the Democratic primary,
9 which is the primary in which African Americans are most likely
10 to vote, combined with the likelihood that the district, if it
11 elects an African-American candidate in a primary, would then
12 be able to elect an African American in the general election
13 with the combination of votes from the African-American
14 community, other minority communities, and others including
15 whites who might, in their affiliation with the Democratic
16 party, support a candidate of that party regardless of the race
17 of that candidate.

18 Q Did you talk to any members of the Virginia legislature?

19 A No, I did not.

20 Q Did you talk to any members, any Black Caucus members?

21 A No, I did not.

22 Q Did you talk to any Virginia voters about the plan?

23 A No, I did not.

24 Q And the two elections -- and I understand your testimony
25 to be the strong basis is based upon the Obama results and

1 another race, Fairfax?

2 A The other race is the Fairfax race, and the reason for
3 my -- at least one reason for my confidence in the usefulness
4 of those races for predictive purposes is that I made use of
5 those contests in seeking to determine the reconfiguration of
6 Congressional District 3 in the 2000 remedial maps that were
7 proposed to the *Alcorn* court, and the prediction that I gave
8 that the district, as reconfigured, even though it was a
9 district with substantially reduced minority population, would,
10 nonetheless, continue to elect a minority candidate of choice
11 and continue to provide a minority opportunity district. That
12 prediction was borne out by the elections that were held
13 subsequent to the adoption by the *Alcorn* court of a remedial
14 map which was one of the two maps I had provided to that Court.

15 Q Is there a difference in turnout between different
16 communities in a presidential election year than in years where
17 there's not a presidential or any federal elections?

18 A Yes.

19 Q Significant difference?

20 A Yes.

21 Q Any members of the legislature being elected the same year
22 as Obama?

23 A No, there were not, because Virginia elections to the
24 legislature take place in odd-numbered years.

25 Q Wouldn't that have been more probative to look at the

1 elections in the years, the same years as they're actually run?

2 A As I indicated in my inventory of best practices, one of
3 the characteristics that is very important in best practices is
4 if one is going to be analyzing elections which are potentially
5 biracial in their contests, it is appropriate to analyze
6 elections for comparison purposes which are also biracial.

7 Q When the plan was enacted in 2011, do you know how many
8 majority black districts were represented by white elected
9 officials?

10 A No, I do not.

11 Q Have you ever inquired about that number?

12 A No, I have not, because all of my concern is the ability
13 of the minority community to elect a candidate of choice.

14 Q If we could turn to --

15 JUDGE PAYNE: Excuse me. Fairfax election in
16 Virginia, are you talking about the lieutenant governor?

17 THE WITNESS: Yes.

18 JUDGE PAYNE: What year was that?

19 THE WITNESS: I believe 2013, Your Honor.

20 THE COURT: And Obama?

21 THE WITNESS: 2012. I didn't mean to answer a
22 question you haven't yet asked, Your Honor, but I indicated in
23 my report why I was using the Obama 2012 data rather than the
24 Obama 2008 data. There would have been no difference if I used
25 the 2008 data. Obama actually did less well in 2012.

1 JUDGE PAYNE: I don't recall Fairfax being in 2013.

2 THE WITNESS: It was not the general election --

3 JUDGE PAYNE: You're talking about the democratic
4 primary.

5 THE WITNESS: That is my understanding, Your Honor.

6 JUDGE PAYNE: So that is correct. All right.

7 Q If I could turn to Exhibit F, it's document 337-6.

8 A Yes, I have available to me that document.

9 Q And let me indicate to you and to the Court, I'm not
10 asking you to verify this document. I'm only using it as a
11 device to assist us in moving rapidly through what I think are
12 going to be relatively simple questions.

13 My understanding is that you have or have not read the
14 Court's opinion?

15 A I have read the Court's opinion.

16 Q And would it be a fair characterization that the Court has
17 some series of very specific criticisms of each of the
18 districts which it found to be unconstitutional?

19 A My understanding is that it had, yes.

20 Q Did you use that as a device to assist you in drawing your
21 plan?

22 A No, because I was drawing a plan that was intended to be a
23 plan which began without race as a preponderant motive, used
24 racially neutral criteria, that is to say the preservation of
25 county boundaries, and was drawn with no intent to either harm

1 or help the members of any political party, and that was what I
2 was primarily making use of. Plus I sought to avoid splitting
3 of VTDs because that was also something which the Court was
4 concerned about, especially insofar as those VTD splits
5 indicated a racial preponderance.

6 Q So is it fair to deduce from that that you did not
7 perceive that the Court's actual observation on the existing
8 plan and specific things which were indicia of racial
9 predominance simply weren't relevant to your consideration?

10 A No, that is certainly not the case. I took, in general,
11 the Court's considerations to be the existence in the previous
12 map, in the enacted map, of a pattern and practice of taking
13 particular pieces of geography from what were essentially
14 white, heavily white districts and moving portions of that
15 geography with heavily black population into already
16 substantially black districts in such a fashion as to increase
17 their population toward, if not actually achieving, 55 percent.

18 I also took from the Court's documents, the Court's
19 opinion, the views that the Court expressed that in looking at
20 the way in which VTDs had been split in the enacted map, there
21 appeared to be a pattern and a practice of racial splitting of
22 VTDs in a way that took VTDs which crossed county lines and
23 moved populations in those -- sorry, VTDs which basically were
24 near county lines and split those VTDs in a fashion that
25 appeared to have a racial purpose.

1 Q Okay. Do you know how many VTDs that the Court complained
2 about were split on that basis that you maintained in your
3 plan?

4 A Yes. Actually I believe I can answer that question.

5 Q Yes, please do.

6 A Of the VTDs that the Court complained were split, I
7 believe the correct answer to that question is that holding the
8 enacted map -- I'm sorry, I cannot answer that question fully.
9 I can only answer that question with respect to districts that
10 were in the enacted map, and in the enacted map there are --
11 let me find the right piece of paper here.

12 There are ten districts which were in the enacted map --
13 sorry, ten VTDs which were in the enacted map which are --
14 which were split in the enacted map, and those VTDs are also
15 split in the 26 district composite configurations based on my
16 illustrative models, but of those ten districts which overlap
17 VTD splits that took place -- that were found in the enacted
18 map, I believe that only two of these ten VTD splits actually
19 involve districts which the Court found unconstitutional.

20 So two out of the ten VTD splits which remain from the
21 enacted map, exactly two of those ten are VTD splits -- to best
22 of my present knowledge and understanding are VTD splits which
23 possibly could have been ones which the Court referenced in
24 it's document, because those VTD splits did, indeed -- of the
25 ten, those two did, indeed, involve districts which were held

1 by the Court to be unconstitutional.

2 Q So are you saying that you went back through the Court's
3 opinion and determined which VTDs they objected to, and then
4 you determined whether or not they were split in your plans?

5 A No. What I did was to look at the 34 VTDs which, as
6 indicated in, I believe addendum number four, but I could be
7 wrong as to which addendum it is, but the 34 VTDs which are
8 split in the 26 district changed configuration. I looked to
9 see which of those 34 districts actually involved
10 unconstitutional districts, and I determined, when I did that
11 analysis late last night knowing that, in fact, I was going to
12 be on the witness stand today, when I did that analysis late
13 last night, I determined that of the 34 VTDs which are split in
14 the 26 district configuration, most of these VTDs are, in fact,
15 not VTDs which are involved with unconstitutional districts.
16 As I just indicated, of the ten VTD splits that occur that were
17 found in the previous map, the unconstitutional map, exactly
18 two of those, to the best of my present understanding very late
19 last night, are ones which, in fact, involve unconstitutional
20 districts.

21 Q I'm not sure my understanding is exactly the same, but
22 we'll move on from there, and we can supplement the record on
23 that. If you would turn to Exhibit F, this is document 337-6,
24 page four of nine --

25 A Document 337-6, okay, page four of nine.

1 Q Yes. It's a few pages of a chart.

2 A Yes.

3 Q Let me ask you a preparatory question, and then I'll
4 describe what the chart is and then ask you some questions.
5 Are you familiar with The Fan neighborhood in Richmond?

6 A No, I am not.

7 Q What this chart does, we think -- well, but maybe not --
8 is to take language from the Court's opinion based upon the
9 various districts and the very specific criticisms that the
10 Court had on those districts which they indicated showed racial
11 predominance. Let me represent to you, and someone can correct
12 me, that the issue of the division of the neighborhood in
13 Richmond called The Fan was quite contentious in, I believe,
14 both litigations.

15 A I accept your characterization of the litigation. I did
16 not review that element of the litigation.

17 Q So let me describe what I believe accurately what the
18 Court said and ask you if you know whether or not you dealt
19 with it. So there's a VTD in The Fan, 207, that was removed
20 from District 71 and transferred into District 68 that was
21 represented by then incumbent Republican Loupassi, and as a
22 result, The Fan district, which was previously contained
23 primarily in District 71, was split between District 71 and 68.
24 The Court held that as evidence of racial predominance. Did
25 you correct that or change that in your plan?

1 A No, I did not. As I stated explicitly, this is one of the
2 few VTD splits which I did actually specifically reference in
3 my initial report and subsequent addenda. That VTD split, to
4 correct, would require changing the boundaries of District 68.
5 As I specifically stated in my report, were the Court to
6 instruct me to change the boundaries of District 68, which are
7 presently left unchanged, that would, indeed, allow me, in a
8 plan proposed to the Court, to correct that VTD split.

9 Q I think that's actually a slightly different question than
10 what I asked you. I was really talking about the removal of a
11 VTD here out of The Fan. I think you answered a different
12 question. Your question probably was about --

13 JUDGE PAYNE: Just ask it again.

14 Q Here's the question: There was a good deal of dispute
15 over VTD 207, its removal from District 71 and transferred to
16 District 68. There was the dispute over whether that was done
17 at the request of the incumbent member -- he has a restaurant
18 there -- or whether it was part of a racial decision-making.
19 So you have the same location in your plan. It's not a split
20 VTD. It's the moving of the VTD.

21 A Apologies.

22 JUDGE PAYNE: Wait a minute. That's not a question
23 yet. That's a statement.

24 Q You answered a different question; right?

25 A So let me respond --

1 Q You were answering my next question about the split VTD
2 which contained the same.

3 JUDGE PAYNE: I'm sure that helps you all understand
4 what you are talking about, but that series of exchanges
5 doesn't help me understand what you are trying to make. The
6 bottom line is, ask two different questions, but ask them in
7 simple, straightforward ways so that I can understand the
8 answer and he can give in a simple, straightforward way.

9 MR. BRADEN: My apologies. That was remarkably
10 confusing, I agree, Your Honor.

11 Q Do you know whether your plan has VTD 207 in The Fan in
12 the identical manner as the enacted plan?

13 A Insofar as this plan has exactly the same configuration of
14 68 as in the enacted map, then any feature of that
15 configuration would, indeed, carry over into the illustrative
16 Richmond area modules I drew, so the answer is yes.

17 Q Then I'll ask the question that you've already answered,
18 but I'll ask it because it's going to be hard to figure out
19 from the record. So predominantly white VTD 205 was split
20 between District 71 and District 69, another challenged
21 district. The Court criticized the legislature for doing this
22 and saying it was a racially based split. It appears to us
23 that your plan has exactly the same split. Is that wrong?

24 A The answer to that question, which is a straightforward
25 one, the answer is probably that, yes, the same split is found.

1 If you give me a moment, I will verify that that is, indeed,
2 accurate. So this is a split between which two districts?

3 Q 71 and 69.

4 MR. HAMILTON: Your Honor, at this point, I would
5 object to this as cumulative. We have over a hundred different
6 bits of circumstantial evidence summarized on this chart. I
7 think Mr. Braden has made his point. I'm certainly prepared to
8 address the relevance of any of this, so I object both on
9 relevance, on the grounds that it is cumulative, and we're now
10 well beyond 15 minutes Mr. Braden promised to wrap this up.

11 JUDGE PAYNE: The second part of your objection is
12 correct, you are beyond 15 minutes, but the other part of it is
13 overruled. Go ahead and get it in the record and get it
14 straight.

15 MR. BRADEN: Sure.

16 THE WITNESS: Could you give me the particular VTD
17 you were talking about?

18 MR. BRADEN: Sure. 505.

19 JUDGE PAYNE: 205, isn't it?

20 MR. BRADEN: Now I'm talking about VTD 505.

21 JUDGE PAYNE: 505, okay.

22 A That particular VTD basically, because the way in which
23 the configuration was drawn, certainly not for any intent, has
24 exactly 5.1 percent minority --

25 JUDGE PAYNE: Excuse me. The question is, where is

1 505 in your recommendation; is that right?

2 MR. BRADEN: Yes. It's a very simple question.

3 Q Is not your plan the identical split as in the enacted
4 plan?

5 A In this instance, yes. The answer has to be yes.

6 MR. BRADEN: Let me ask one more question. Obviously
7 there are pages that we could waste everybody's time. I'll ask
8 one more example because the relevance of this, I think --

9 JUDGE PAYNE: Nobody has objected to it yet, so ask
10 the question. You may get one, but go for it.

11 MR. HAMILTON: I can offer it.

12 Q Let me go to page two, HD 69. District 69 received
13 77 percent of the population from the split of 410, but
14 93 percent of that VTD was black voting-age population. That
15 is an observation of the Court which they, the Court,
16 determined was an indication of racial predominance in drawing
17 the plan. Doesn't your plan have exactly the same breakdown?

18 A Yes, but not as part of the racially preponderant plan.
19 It occurred because I drew lines on a map. It certainly did
20 not occur because I drew lines on a map for a racially
21 preponderant purpose.

22 Q So when you do this split, the Court should assume it's
23 not racially based.

24 A When I minimize the total number of VTD splits, and in
25 particular minimize the number of VTD splits which cross county

1 lines but also in general to the point that of the VTD splits
2 that I have, ten of them are in the enacted map, four of them,
3 as I remember correctly, are zero population VTD splits and,
4 therefore, not particularly relevant and easily cleaned up in a
5 perfected plan, and other of these VTD splits involve
6 essentially not racial questions because they involve white
7 populations on one side and white populations on the other
8 side, or they involve black populations on one side and black
9 populations on the other side. By the way, one last --

10 JUDGE PAYNE: I think that answers the question.

11 MR. BRADEN: Your Honor, that's sufficient.

12 THE COURT: Is there anybody --

13 THE WITNESS: Mr. Braden, apologies, because I do
14 want to clarify for the Court before you leave in case you have
15 a further follow-up question. I apologize to the Court. I do,
16 indeed, get confused by Virginia nomenclature.

17 So when Mr. Braden was asking me about Hampton city,
18 I wrongly assumed that he was referring to some specifically
19 designated part of what I have been treating as Hampton County,
20 and then that changes my answer to one of the Court's questions
21 because the Court asked about the western -- I'm sorry, the
22 western boundary of District Number 92, and the correct answer
23 to that question, Your Honor, is that there are black areas on
24 both sides of that boundary line, but the boundary line is a
25 county line.

1 MR. BRADEN: Thank you, Dr. Grofman.

2 THE COURT: Cross-examination?

3

4 CROSS-EXAMINATION

5 BY MR. HAMILTON:

6 Q Good morning, Dr. Grofman.

7 A Good morning, sir.

8 Q Kevin Hamilton for the plaintiffs. I have far fewer
9 questions for you. Hopefully they're a little -- they're
10 straightforward. You were the special master in the
11 *Personhuballah* case regarding the Virginia Congressional map;
12 correct?

13 A Yes, I was.

14 Q And you proposed a remedial map in that case?

15 A Yes, I did.

16 Q It was adopted by the Court?

17 A Yes, it was.

18 Q And that map has governed Congressional elections here in
19 the Commonwealth of Virginia ever since; is that right?

20 A Right.

21 Q Is it fair to say that you followed the same approach in
22 drawing this remedial map or these modules, as you've called
23 them, as you did in drafting the Congressional remedial map in
24 *Personhuballah*?

25 A Yes, that is correct.

1 Q So let's talk about that approach. You set out at the
2 first instance to draw districts consistent with traditional
3 redistricting principles; is that right?

4 A Yes, that's right. Do you want me to elaborate, or do you
5 want to continue the list?

6 JUDGE PAYNE: No, I think let him ask and then you
7 can answer, because it may shorten things.

8 Q So I think you said in your report, I would emphasize in
9 my line drawing I have not ever sought to achieve any
10 particular predetermined percentage of black voting-age
11 population within a district, but, rather, have drawn districts
12 in accord with traditional redistricting principles and then
13 afterward checked to make sure that unintentional vote dilution
14 was not present, close quote. That's your report --

15 A Exactly. That is exactly what I said --

16 JUDGE PAYNE: Remember, let him finish, and you
17 start, and vice versa, because the court reporter can't take
18 both of you at the same time.

19 THE WITNESS: Sorry, my fault.

20 Q It's okay. You can go ahead.

21 A I've completed my answer.

22 Q So those traditional redistricting principles include
23 respect for political subdivision boundaries?

24 A Yes, that is also correct.

25 Q Like the county line you just mentioned a moment ago?

1 A Yes.

2 Q Attention to compactness, that's a traditional
3 redistricting principle?

4 A Yes, it is.

5 Q And contiguity, that's traditional --

6 A Yes.

7 Q -- redistricting principle?

8 A Yes.

9 Q You also took care to limit the geographic scope of the
10 remedial area? That was one of the factors you took into
11 concern?

12 A Yes.

13 Q And in drawing districts in accordance with those
14 principles, that resulted in a set of proposed maps or proposed
15 modules in different areas of the state.

16 A Yes, that is correct as well.

17 Q Okay. And then the next step of your process was you
18 checked to make sure that unintentional vote dilution was not
19 present; is that right?

20 A Yes, that is also correct.

21 Q Based on that approach, each of the challenged districts
22 ended up with a black voting-age population at around or below
23 55 percent --

24 A Ranging from 43 percent to 55.01 percent using the DLS
25 racial percentages ranging from -- I've forgotten -- roughly

1 43 percent to slightly under 55 percent using the definition of
2 African-American population as mono racial.

3 Q I think -- let me ask you this question about this whole
4 black voting-age population with or without those who identify
5 themselves as Hispanic. Does any of that matter for the
6 purposes of your analysis in drawing these maps?

7 A To my mind, no. As I've indicated to the Court, I
8 provided the comparative numbers for at least the enacted map.
9 Were one to provide comparative numbers for each of the
10 illustrative modules, essentially the differences would be
11 trivial or minor.

12 JUDGE PAYNE: Are you saying that the differences
13 between the census BVAP and the BVAP used by the Legislative
14 Services is statistically insignificant?

15 THE WITNESS: Statistically insignificant, Your
16 Honor, with apologies, is the wrong term.

17 JUDGE PAYNE: Why doesn't it make --

18 THE WITNESS: It's small. Very, very small.

19 JUDGE PAYNE: Sometimes small differences are
20 important in life. Why is this small difference not important,
21 in your view?

22 THE WITNESS: Because the difference, for example,
23 Your Honor, between a 54.98 percent black voting-age population
24 and a 55.01 black voting-age population is essentially a
25 trivial difference.

1 JUDGE PAYNE: I have a follow-up question to your
2 procedure which, I'm sorry, Mr. Hamilton, I'd like to ask now
3 so I understand it. You did as Mr. Hamilton said, and then you
4 looked at -- you checked your work against the -- on the racial
5 basis.

6 THE WITNESS: Yes, that is correct.

7 JUDGE PAYNE: What, if any, change occurred in any of
8 your plans as a result of the change -- the checking that you
9 did?

10 THE WITNESS: At the initial stage when I did the
11 checking, that was before I had looked at incumbency effect.
12 So I basically have checked twice. I first checked when I was
13 looking at plans where I wasn't worrying about incumbency or
14 had no incumbency information. That did not change -- to the
15 best of my recollection, that did not change anything.

16 The next issue was whether there was a change after I
17 took into account incumbency, and there, to the best of my
18 recollection, the only change that I made was in the boundaries
19 between 89 and 90 where I made some very, very minor
20 adjustments to balance population between the two districts.

21 But basically the answer to the question, sir, is
22 that because of the way in which the lines were drawn, given
23 the geography and the demography of Virginia, it was possible
24 to draw 11 districts that, in my view, ultimately the Court's
25 choice, decision, remedied the infirmities without having

1 issues of vote dilution, meaning situations where the district
2 was not sufficiently minority in population that there might be
3 a question as to whether African-American candidates of choice
4 would actually be able to be elected.

5 JUDGE PAYNE: In the change that you did make, the
6 one change that you did make, what district was it in, and was
7 it made to achieve a racial result in whole or in part?

8 THE WITNESS: No.

9 JUDGE PAYNE: What district was it?

10 THE WITNESS: 89 and 90.

11 JUDGE PAYNE: What change did you make? You said you
12 made some changes. What were --

13 THE WITNESS: I did, in fact, make a one-VTD, two-VTD
14 exchange between the two -- between the two districts to more
15 equally balance population. The VTD splits that I have done,
16 Your Honor, in general, have been between adjacent
17 overwhelmingly minority districts, and I have done some minor
18 population balancing.

19 JUDGE PAYNE: Excuse me, Mr. Hamilton.

20 MR. HAMILTON: Thank you, Your Honor.

21 Q Let me just go back, because I want to just firmly put
22 this to the side, this whole dispute about how we calculate
23 black voting-age population, in your mind whether we call it
24 statistically insignificant or simply irrelevant. It's not
25 something of importance that should distract this Court in

1 considering the difference between these plans.

2 A I will take that as a question and to which my answer is
3 yes.

4 Q Thank you. So you agree with Delegate Jones when he said
5 the reason he didn't mention it on the floor was that he didn't
6 think it was statistically significant. He's probably not
7 using that term the way you would, but you get his point?

8 A Yes, I understand his point.

9 Q And agree with it?

10 A Yes.

11 Q Thank you. You didn't -- perhaps I'm repeating what
12 you've already said, but you didn't set out to draw districts
13 at or below 55 percent as a racial target?

14 A No, I certainly did not.

15 Q Or at 50 percent or at any other number?

16 A That's right. As I very clearly stated, there was no
17 magic number that I sought to achieve. The racial demography
18 of the state of Virginia is very different in different parts
19 of the state, and those differences essentially drive
20 differences across the illustrative modules in the different
21 geographic regions because there are some areas of the state,
22 Richmond, for example, Norfolk, which are overwhelmingly black.

23 Q Okay, and after you did the -- drew these maps using
24 traditional redistricting criteria, I think you said, as the
25 Court short-formed it, as you checked your work, you conducted

1 an analysis to determine that African-American voters would
2 maintain their opportunity to elect preferred candidates in the
3 challenged districts?

4 A Yes, that is exactly right.

5 Q And your conclusion was that there was no danger in that
6 regard based on the districts you had drawn?

7 A Yes, that is my view.

8 Q In reaching that conclusion, you used exactly the same
9 criteria that you used when serving as a special master in the
10 *Personhuballah* case but now applied them to election data
11 compiled in the proposed remedial legislative districts?

12 A Yes, that is correct.

13 Q In reaching that conclusion, you also reviewed the
14 analysis provided to this Court by Dr. Max Palmer; right?

15 A Yes, I did.

16 Q And you reviewed a portion of the report of Dr. Lisa
17 Handley in the *Personhuballah* case attached as an appendix to
18 the briefs submitted by the Governor of Virginia?

19 A Yes, I did.

20 Q And you used those materials to complement the analysis
21 that you did on your own?

22 A Yes, along with data on actual election results in
23 Congressional District 3 and also in Congressional District 4.

24 Q And you didn't make any adjustments to the black
25 voting-age population in any of the proposed districts or

1 modules based on that analysis; correct?

2 A That is correct.

3 Q Now, in your report you wrote, and I quote -- this is from
4 your initial report on page 121, but I'll just read it to you.
5 My own illustrative configurations and the analysis I have done
6 of those configurations indicate that it is not necessary to
7 avoid vote dilution to draw maps in which any of the redrawn
8 districts exceed 55 percent black voting-age population, close
9 quote. Is that what you wrote?

10 A Yes.

11 Q Now, that may be the reason why you rejected the maps
12 proposed to you by the various parties in this litigation, but
13 that belief did not drive how you drew the districts in the
14 first instance; correct?

15 A Two things: A, it did not drive how I drew the districts
16 in the first instance, nor, actually, to go back to the actual
17 text of my report, it was not the sole or even the major
18 factor, at least with respect to most of the submitted remedial
19 plans, in the decision that I reached not to recommend any of
20 those plans to the Court.

21 MR. HAMILTON: Thank you, Dr. Grofman. I have no
22 further questions, Your Honor.

23 JUDGE PAYNE: Mr. Heytens.

24 MR. HEYTENS: We have no questions, Your Honor.

25 THE COURT: Any redirect?

1 MR. BRADEN: No, Your Honor.

2 JUDGE PAYNE: Thank you, Dr. Grofman. You may step
3 down. Excuse me just a minute. Do any of the judges have
4 questions?

5 JUDGE KEENAN: No.

6 JUDGE PAYNE: Thank you very much. You may remain in
7 the courtroom, Dr. Grofman, and you can take some water back
8 there with you if you need it. You've been called upon to talk
9 a lot.

10 All right, we can hear argument at this time, and we
11 will -- our plan is to take a luncheon recess at one o'clock
12 based upon what you all told us you thought the lengths of your
13 presentation might be. We ought to be able to proceed on
14 accord with that schedule, but before we do, I would like to
15 see, and -- I couldn't find it in the record, but I would like
16 to see the parties sit down and agree upon, put up a chart that
17 has every -- of the 11 districts and all of the changed
18 districts that have the BVAP listed for each in the enacted
19 plan, and if it makes a difference, if you all are willing to
20 stipulate it doesn't make any difference what you choose, okay,
21 you can just use one, but if you can't, the census BVAP versus
22 the -- what is it called? -- the DOJ BVAP, is that what it was?
23 And then the BVAP in each changed -- each district as changed.

24 I don't understand from the report or from anything
25 you all have filed how much change actually has occurred

1 anywhere, and I think it would help, at least me, to understand
2 if you all could present that in some kind of chart form, and
3 since I would think it's something you could agree upon and it
4 wouldn't take long to do, maybe.

5 I think also we are all of the view that it would be
6 helpful, Dr. Grofman, to have -- given the number of addenda,
7 to have a final report that reflects all the corrections that
8 were made in the various addenda, not making anything else but
9 making sure that those changes appear so that there's one
10 single document -- in a way that there's one single document
11 that we can look at. Is that satisfactory?

12 JUDGE KEENAN: Yes.

13 JUDGE PAYNE: Let's see, the plaintiff has the
14 burden, so you are up, Mr. Hamilton.

15 MR. HAMILTON: Thank you, Your Honor. This Court
16 found on June 26th, 2018, that the Virginia House of Delegates'
17 redistricting plan was a violation of the equal protection
18 clause of the 14th Amendment. Because the political branches
19 of state government have failed to adopt a new remedial plan,
20 and both this Court and the United States Supreme Court have
21 denied a stay, it now falls to this Court to adopt an effective
22 redistricting plan to cure the unconstitutional racial
23 gerrymander unlawfully imposed on the state.

24 Plaintiffs respectfully submit that their proposed
25 remedial plans are best suited to address that task.

1 Plaintiff's remedial plans preserve the structure of the
2 enacted plan but are superior to the enacted plan with respect
3 to every objective measure. Plans are both more compact and
4 split fewer political subdivisions than the enacted plan.

5 The major difference between the two variations
6 proposed by the plaintiffs' plan A and plan B are in the
7 treatment of Charles City County. To best remedy District 74,
8 the map draws a more compact district centered in Henrico.
9 That leaves Charles City County without a home. Plan A moves
10 the county into District 62, plan B moves the county into
11 District 70. Either would be effective remedy maps, and we
12 propose them as alternatives.

13 The maps were all proposed and prepared using the
14 methodology adopted by Dr. Grofman in the *Personhuballah* case
15 and, of course, as he just testified in this case. That is
16 rather than using race as a predominate factor, rather than
17 using a 55 percent racial target, plaintiffs' maps were drawn
18 using traditional redistricting criteria and only thereafter
19 examined to ensure that the maps were non-retrogressive and to
20 ensure that no incumbents were pared.

21 Plaintiffs respectfully submit that their proposed
22 remedial maps offer the best path forward to effectively remedy
23 the unconstitutional race-based gerrymander identified by the
24 Court. It requires no further additional work, no choosing of
25 modules or other issues.

1 Dr. Grofman rejected the plaintiffs' proposed
2 remedial maps primarily because they altered more districts
3 than he judged necessary, but there's no rule of law, much less
4 redistricting principle, that requires keeping the number of
5 affected districts to an absolute minimum as Dr. Grofman
6 appears to have believed and applied.

7 Rather, as the special master himself conceded, how
8 many other districts are affected is just one factor in a
9 series of potential trade-offs among traditional redistricting
10 criteria. That's his initial report on page five. While
11 plaintiffs agree that the Court should avoid changing
12 non-challenged districts based solely on reasons unrelated to
13 the remedy of the unconstitutional challenged districts, where
14 changes to adjacent districts flow from a full and effective
15 remedy to the constitutional violation, then consideration of
16 traditional redistricting criteria, things like minimizing
17 locality splits and maximizing compactness, may warrant
18 alteration of a greater number of surrounding districts, and
19 that's exactly what the plaintiffs sought to achieve here in
20 proposing plans.

21 JUDGE PAYNE: Which plan do you want of yours?

22 MR. HAMILTON: They are equally acceptable to the
23 plaintiff. We would propose plan A as the preferable plan if
24 we had to choose between the two. We submit that the
25 plaintiffs' proposed plans make the appropriate trade-off while

1 limiting the degree to which changes are made to areas
2 surrounding the unconstitutional districts.

3 In the alternative, the NAACP has proposed a remedial
4 plan, and plaintiffs certainly don't object to that plan either
5 and think it offers an effective remedial plan, and perhaps
6 implicit in that statement, there are more than one way --
7 there are -- there is more than one way to solve this
8 constitutional problem adopting a traditional redistricting
9 criteria. As Dr. Grofman has indicated in his report, it's a
10 trade-off of compactness versus county lines versus city lines
11 and minimizing locality splits.

12 How you approach it, the overall most important
13 factor is to remedy the constitutional violation. And so as
14 between plaintiffs' plan A, plaintiffs' plan B, we would prefer
15 plan A and, as an alternative, the NAACP plan.

16 JUDGE PAYNE: Which of Dr. Grofman's modules do you
17 think, in combination, is best suited if neither of those
18 alternatives is adopted by the Court?

19 MR. HAMILTON: Plaintiffs would submit that the Court
20 should adopt Richmond 1A, Petersburg 2, Peninsula 2, and
21 Norfolk 1A. Let me just take a moment to explain why.
22 Addressing Richmond 1A first, there are two variations offered
23 with respect to the Richmond area. Richmond 1A, we'd submit,
24 is plainly preferable.

25 Richmond 1B offers a wholesale redrawing of

1 Districts 72 and 73 to improve the overall district
2 compactness, but Dr. Grofman admits this is really unnecessary
3 to remedy the unconstitutional districts, and the changes are
4 not modest. Roughly 42 percent of the population from
5 District 72 is swapped with District 73 and vice versa.

6 The Court's task, as I mentioned, is to address and
7 remedy the constitutional violation. Other changes, even those
8 that might improve the map in other ways, unless they're
9 related to that remedial task, should be declined. So for that
10 reason, Richmond 1A, which doesn't make those gratuitous
11 changes and retains nearly all of the current populations in
12 the two affected districts while remedying the racial
13 gerrymander in this area, is the preferred module.

14 In Petersburg 2, the primary difference between the
15 alternatives is the way the map addresses Dinwiddie County. In
16 the adopted map, I'm sure the Court will recall, Dinwiddie
17 County was split, the avowedly racial split of the county,
18 split between District 75 and 63. The other two options in
19 Petersburg proposed in the modules, Dr. Grofman's modules,
20 preserved that split and with it carry forward the race-based
21 construction of District 63 from the enacted plan.

22 As demonstrated by Petersburg 2, which keeps
23 Dinwiddie County whole within District 63, it's not necessary
24 to split Dinwiddie County either to cure the racial gerrymander
25 of District 63 or for population equality reasons when

1 redrawing the map. Petersburg 2 is the superior option for
2 that reason alone, and I'll just note that both the NAACP and
3 the Princeton gerrymandering project also agree that that's the
4 preferred module in this area.

5 Peninsula 2, the problem in this area, as the Court
6 will recall, it was District 95 which snakes up the Peninsula
7 to scoop up far-flung pockets of African-American voters. Any
8 effective remedy necessarily will require significant changes
9 to that district, District 95 and, as a result, to neighboring
10 Districts 93 and 94. Peninsula 2 keeps the basic structure of
11 Districts 93 and 94 the same.

12 Peninsula 1 would impose far greater change on those
13 two neighboring non-challenged districts. So we would submit
14 Peninsula 2 fully renders the gerrymander without imposing the
15 degree of change on the two neighboring non-challenged
16 districts, and, again, not that it's a popular vote but the
17 NAACP and the Princeton gerrymandering project also agree that
18 that's the preferred module in this area.

19 Finally, in Norfolk 1A, there are three minor
20 variations proposed by the special master. We would submit
21 that the Court should adopt Norfolk 1A. This variation
22 proposes a highly compact version of District 77 centered in
23 Chesapeake nearly tripling the compactness score. While the
24 black voting-age population drops significantly, the special
25 master appropriately analyzed voting patterns in this area and

1 concluded that African-American voters would have an equal
2 opportunity to elect candidates of their choice under the
3 configuration of Norfolk 1A. It is, accordingly, most
4 consistent with traditional redistricting principles and the
5 most appropriate remedy for the gerrymander in this area.

6 JUDGE PAYNE: Mr. Hamilton, does plaintiff's plan A
7 or the NAACP plan or Richmond 1A, Petersburg 2, Peninsula 2,
8 Norfolk 1A as proposed by the special master change, in any
9 way, District 75 which has been affirmed by the Supreme Court?
10 If it does, what's the significance of doing that?

11 MR. HAMILTON: I can't answer the question off the
12 top of my head. If I can have a moment when counsel is
13 speaking, I can confirm that. Let me address the intervenor
14 defendant's maps if I might. They have proposed two
15 alternative maps that were introduced but not passed or even
16 voted on in the House of Delegates, House Bill 7002 and House
17 Bill 7003.

18 Both of these maps are uniquely ill-suited to the
19 task before this Court. House Bill 7003 can be put aside at
20 the outset as even the intervenors themselves appear to oppose
21 it noting that it has potential flaws for racial gerrymandering
22 and is based on a plan that is wrong as a remedial approach and
23 embodies an unknown racial purpose.

24 Worse, Delegate Jones admitted that the plan was
25 designed to, quote, preserve the 2011 map's partisan balance

1 which makes it inappropriate for consideration by this Court.

2 House Bill 7002 fares no better. The plan was
3 explicitly designed to preserve the political makeup of
4 neighboring districts so as to preserve the composition the
5 legislature established in 2011. In short, intervenors'
6 proposed remedial plan was designed with the overriding purpose
7 of advancing political goals, something that is absolutely
8 inappropriate for Court-ordered remedial plan. The approach is
9 wrong as a matter of law, unsupported as a matter of fact, and
10 was flatly rejected by both Dr. Grofman and the unanimous court
11 in *Personhuballah* even before this very court.

12 As Your Honor Judge Payne noted, quote, courts have
13 unanimously agreed that political considerations have no place
14 in a plan formulated by the courts, close quote. Cases
15 supporting Judge Payne's statement are legion. We provided a
16 small selection in our objection to the intervenors' plan at
17 docket 305, page five, footnote one, and I won't obviously
18 repeat them here.

19 JUDGE PAYNE: Mr. Hamilton, given that the thoughtful
20 processes have occurred in the briefing here in the court, and
21 considering that the General Assembly is in session, and
22 considering that both political parties and the governor have
23 acted in a way that is inconsistent with their obligations to
24 the citizens of Virginia to do the redistricting in the first
25 place, would it be appropriate for us to take a pause and

1 remand this for immediate consideration by the General Assembly
2 of Virginia requiring all of them to come to reality and face
3 the evidence that is presented here in these reports?

4 After all, it is the responsibility of the
5 legislature and the governor to come to a process and a result.
6 We've had to do it, and we're prepared to do it, but should we
7 give them one more chance given the situation that we have now
8 in this record?

9 MR. HAMILTON: No, Your Honor. The short answer is,
10 this Court has been extraordinarily deferential to the
11 legislature, as it should have, gave the legislature the
12 opportunity and an extensive opportunity to address it. Based
13 on what happened in front of the legislature, there's no reason
14 to think that the result would be any different, especially
15 under a very short timeline, number one. Number two, the
16 intervenors have already asked this Court for a stay.

17 JUDGE PAYNE: That's ended, because the Supreme Court
18 has denied it.

19 MR. HAMILTON: Then they asked the Supreme Court for
20 a stay, and both courts denied the stay. The time has come.
21 It is January 2019. We are now in the election year, and, you
22 know, I don't want to speak for the Commonwealth election
23 machinery, but we need this map, and it falls to this Court,
24 just like it would in the event of a political deadlock map
25 where the parties, in the first instance, simply can't agree on

1 redistricting. It happens from time to time, and it falls to
2 the federal court to draw the map.

3 It's an unwelcome burden, but that is where we are.
4 It is clear that there will never be a map adopted by this
5 legislature and this governor.

6 JUDGE PAYNE: Not if they all act in the same
7 stubborn fashion they've been acting in. I wasn't suggesting
8 that we stop our process. I was suggesting that we go forward
9 and take time to do an opinion and let the governor and the
10 General Assembly take a fresh look at things and see if they
11 can't come to some reasonable resolution and fulfill the duties
12 that the law really puts upon them for the citizens of
13 Virginia. But you say no.

14 MR. HAMILTON: Yes.

15 JUDGE PAYNE: I don't think you need to pursue it any
16 further then.

17 MR. HAMILTON: Thank you. Intervenors' proposed
18 remedial map fails for a second reason I just want to touch on,
19 and that is a gross misunderstanding of the nature of the
20 violation for which a remedy is required.

21 Rather than address the actual racial gerrymander
22 itself, the intervenors' map devotes its attention to cosmetic
23 alterations designed to tidy up the circumstantial evidence
24 identified by the plaintiffs and found by the Court to evince
25 predominant use of race in the enacted plan. So we saw the

1 list of 111, I think he called them specific criticisms of the
2 Court.

3 With all due respect to Mr. Braden, I don't believe
4 the Court was criticizing the legislature so much as
5 identifying circumstantial evidence that, when coupled with the
6 statements on the floor of the House of Delegates and the
7 express use of the 55 percent black voting-age racial target in
8 drawing and preparing these maps, together demonstrated
9 predominate use of race in the drawing of these maps.

10 Running around the crime scene erasing fingerprints
11 and addressing the circumstantial evidence misunderstands the
12 purpose of what it is that this Court is tasked with today, and
13 that is identifying, preparing, adopting, and ordering an
14 effective remedy to the underlying racial gerrymander, not the
15 little bits of circumstantial evidence to make it more
16 difficult, more difficult to identify.

17 The intense focus on specific circumstantial evidence
18 identified by the Court entirely misses the point. The
19 issues -- those were simply circumstantial evidence, and
20 limiting the remedy to just curing individual, specific VTD
21 splits that followed racial patterns or little weaves or divots
22 in district lines woefully and dramatically fails to address
23 the underlying constitutional issues.

24 It, in the words of this Court, improperly focuses
25 on, quote, particular portions of the line, quote, rather than,

1 quote, the design of the district as a whole, close quote.
2 That is where the focus should be. That quote is from the
3 memorandum opinion at page 79 quoting the *Bethune-Hill* Supreme
4 Court decision at page 800. The attempt to conceal the
5 symptoms of the violation is misguided and should be rejected
6 by the Court.

7 The task before this Court might appear complex but,
8 in fact, is straightforward. Having found the enacted map was
9 drawn with race as its predominant purpose, the Court must now
10 unravel the improper and constitutional map and adapt an
11 effective remedial map that fully addresses and resolves the
12 unconstitutional race-based gerrymander.

13 The Court has a number of maps that accomplish that
14 task. Plaintiffs submit that its two alternatives best
15 accomplish the goal, but the Court has other options that
16 provide acceptable remedies including the NAACP remedial map,
17 and then finally, in the alternative, although we think it's an
18 inferior remedy that doesn't go as far as it should, plaintiffs
19 would not object to the four identified modules contained in
20 the special master's report.

21 I want to thank each member of the Court for your
22 courtesy, patience, and attention throughout the proceedings.
23 It's been an honor to appear before you. Thank you.

24 JUDGE PAYNE: Who is going to address next?

25 MS. RIGGS: Your Honor, would you like to hear from

1 the NAACP next or from a party?

2 JUDGE PAYNE: If you'd like to present, you may go
3 ahead.

4 MS. RIGGS: May it please the Court, thank you. For
5 -- my name is Allison Riggs. I'm with the Southern Coalition
6 for Social Justice. I'm here with my local counsel, David
7 Prince, on behalf of the Virginia NAACP. We appreciate your
8 indulgence in admitting me and my colleague Mr. Jeff Loperfido
9 pro hac vice.

10 We consulted with your chambers, and we have small
11 handouts, notebooks with maps that I think will help explain
12 some of my discussion. May he approach with those notebooks?
13 We have the adequate number of copies.

14 JUDGE PAYNE: Do you have copies for the law clerks?
15 Thank you.

16 MS. RIGGS: We have copies for opposing counsel as
17 well. Your Honors, we're grateful to share the perspective of
18 the Virginia NAACP. I have three, four major objectives in
19 brief I'd like to address with you today; first, the attributes
20 of the NAACP's plan without repeating what's in our briefing.
21 We described how we developed that plan. There's just certain
22 key points I'd like to highlight.

23 Two, I'd like to address why the NAACP's position is
24 that Dr. Grofman's plan, even with the varying modules, aren't
25 fully and effectively remedial. I'd like to address some of

1 Dr. Grofman's criticisms of the NAACP's plan, so why he would
2 reject the NAACP's plan, and then finally just briefly I'd like
3 to address defendant intervenors' suggestion in its briefing
4 that somehow Dr. Grofman, or any plan that reduces the black
5 voting-age population in districts, somehow constitutes
6 intentional vote dilution.

7 Before I hit on those four points, though, I'd like
8 to center this discussion on why we're here in the first place
9 and that this Court is convened because it's been burdened with
10 the unwelcome duty of creating a remedial plan so that we can
11 have timely elections here in the state of Virginia. And that
12 duty is one that requires this Court to ensure that the
13 discrimination and the violation of the 14th Amendment is
14 eliminated root and branch.

15 So it is certainly the position of plaintiffs and the
16 NAACP that Dr. Grofman's plans are better than the 2011 plan,
17 but that's not the legal standard that's applicable to this
18 Court's review and implementation of a remedial plan. Instead,
19 when a federal court is acting in equity to impose a remedy, it
20 must restore victims of discriminatory conduct to the position
21 they would have occupied in the absence of such conduct.

22 And our position is that in the context of a racial
23 gerrymandering case, that means fully unpacking these
24 districts, allowing naturally occurring new opportunity
25 districts to occur without imposing restrictions unjustified by

1 the law such as Dr. Grofman's, what he calls narrow tailoring
2 but is, in fact, a minimum change requirement or an aversion to
3 changing nonadjacent districts or minimizing the number of
4 districts changed.

5 That does not allow black voters in this state, in
6 these distinct areas, which, in fact, amount to a large part of
7 the state, to be restored to the position that they would have
8 been had they not been segregated because of the color of their
9 skin and packed into as few districts as possible.

10 I think there's ample precedent to support this, that
11 there doesn't need to be a minimum change approach to this. In
12 *Abrams*, on remand, the district court -- on remand from the
13 Supreme Court in -- the district court in Georgia acknowledged
14 that it was going to make widespread changes, and it
15 specifically rejected a least-changed plan noting that
16 sometimes starting from racial gerrymanders and trying to make
17 the least change just perpetuates the constitutional violation
18 to begin with. And then --

19 JUDGE PAYNE: Was *Abrams* a case that involved an
20 attempt to comply with Section 5 of the Voting Rights Act and
21 found to be lacking?

22 MS. RIGGS: Section 5 and Section 2 were both
23 applicable to the Georgia legislature when it was drawn back
24 then.

25 JUDGE PAYNE: That wasn't my question. In *Abrams*,

1 was Georgia trying to create majority-minority districts?

2 MS. RIGGS: If I'm correct in my recall, the Georgia
3 legislature believed that in order to comply with Section 5, it
4 needed to create additional districts. So it thought it was
5 complying with Section 5, but even more recently, the *Covington*
6 case out of North Carolina, that court rejected a legislatively
7 proposed plan and ordered a special-master-drawn plan that did
8 not adopt a least-change approach. The three-judge panel
9 instructed the special master to change nonadjacent districts
10 to comply with the criteria that they established, and they
11 instructed the special master to take great care not to
12 preserve the core of an unconstitutional district because that
13 would just perpetuate the unconstitutional flaw, and the
14 Supreme Court summarily affirmed that part of the *Covington*
15 decision. So given that framework --

16 JUDGE PAYNE: How many districts were challenged in
17 *Covington*?

18 MS. RIGGS: There were 28 total. There were four
19 that were -- plaintiffs accused -- plaintiffs objected to as
20 being insufficiently remedial for racially gerrymandered
21 districts that plaintiffs objected to as being insufficiently
22 remedial, and the district court agreed, ordered the special
23 master to fix them. He did not using a least change, and the
24 Supreme Court summarily affirmed those four districts.

25 So then, turning to the attributes and benefits of

1 the Virginia NAACP map and how it was developed, we've detailed
2 that in brief. I don't want to reiterate what you have in
3 front of you, but I want to note that the Virginia NAACP has
4 thousands of members in the challenged and affected districts,
5 and they worked collaboratively to develop a remedial plan that
6 was informed by the residents who lived there in all of the
7 affected areas and in the adjacent districts.

8 I think sometimes we lose track because of the
9 analytical framework. The analytical framework is, of course,
10 directed at the packed district, if you will, the majority
11 black district, but racial gerrymandering is about packing
12 certain districts and then bleaching the surrounding districts,
13 and that centers and concentrates the power of white voters in
14 those surrounding districts.

15 So to say as a matter of principle I don't want to
16 touch those rounding districts, again, perpetuates the harm
17 created by the racial gerrymandering in the first place even
18 though that's not a direct part of the analytical framework.
19 My clients live in those districts, too, and so they have an
20 appreciation of what fully unpacking the affected districts and
21 moving those voters into the surrounding districts really means
22 for them politically.

23 JUDGE PAYNE: Dr. Grofman's plan doesn't confine
24 itself to the 11 districts. It changes something like 21 to 26
25 districts depending upon which module -- how is the principle

1 that you discuss applicable to what's really before us?

2 MS. RIGGS: I think it will come -- I want to discuss
3 the districts that Dr. Grofman drew in the Richmond area
4 specifically, because I think that's where -- I'll be able to
5 crystallize for you why that matters.

6 JUDGE PAYNE: That's really the nub of your argument,
7 isn't it?

8 MS. RIGGS: It's pretty central to it, but before I
9 get there, I just want to explain that the maps drawn by the
10 Virginia NAACP comply with all legal standards and traditional
11 redistricting criteria, and they incorporate the input and
12 understanding and the political realities faced by black
13 voters.

14 So, for example, the community of Church Hill in
15 Richmond, which was split right down the middle between 70 and
16 71 in the enacted plan in 2011, is almost entirely, to the best
17 of our ability, restored in our plan, and this is going to be
18 something that puts black voters back into the place they would
19 have been where -- before they were harmed; that is, allow them
20 to effectively and politically organize just like any other
21 voter, regardless of skin color, to elect someone who will
22 effectively represent their community.

23 Likewise, you know, Dr. Grofman said, in Richmond,
24 I'm going to draw districts that don't cross the James River.
25 Well, there's one part of 69 that does cross the James River,

1 and the NAACP's feedback to us was, well, there's also a town
2 council district there that if 69 matched up pretty closely
3 with this town council district, would make a lot of sense from
4 good government perspective, from get-out-the-vote perspective,
5 from organizing perspective.

6 So this is the kind of input that you get when you
7 talk to communities and allow community to have an input. And
8 this -- and we propose this map is what restores black voters
9 and our clients to the position they would have been but for
10 the racial gerrymandering.

11 JUDGE KEENAN: Excuse me, Ms. Riggs. Let me ask you
12 just one question, if I could, on that point. It seems to me
13 you are suggesting that we should consider very granular
14 propositions; in other words, what one very small area of
15 Richmond or small area of Church Hill would be best suited for.
16 Are you asking for too much? Are you risking the whole for the
17 benefit of the partial?

18 MS. RIGGS: What I would say instead is that by
19 offering you this explanation, one of Dr. Grofman's criticisms
20 might be how many times the NAACP plan split Chesterfield. All
21 I'm saying is that's the sort of neutral, arbitrary,
22 disconnected criticism, and, in fact, it's -- there's an
23 on-the-ground reality that should explain it.

24 We shouldn't put these abstract concepts above, one,
25 fully and effectively remedying the racial gerrymander,

1 restoring black voters to the place they would have been but
2 for the gerrymander, and just understanding that that's not a
3 be-all end-all requirement. So I'm not asking this Court to
4 know all of this or do all of this, but it's explaining why we
5 might have one more cut.

6 JUDGE KEENAN: It seems to me that you are asking us
7 to go beyond the record in this case, because what you have
8 offered to us by way of explanation, while very logical from a
9 community standpoint, doesn't appear in this record. So are
10 you, again, risking the whole for purposes of getting
11 perfection?

12 MS. RIGGS: I think all we're asking this Court is to
13 say Dr. Grofman might have rejected the NAACP plan because it
14 split Richmond one more time, for example.

15 JUDGE PAYNE: The question, though, is, look, this
16 case is going to go to the Supreme Court. We all know that.
17 We issue an order, we do what you want, there's nothing in the
18 record to support it. I can imagine nine justices being
19 somewhat disturbed about a district court opinion that is not
20 grounded in anything in the record.

21 I think that was the question, and your answer, I
22 don't think, dealt with that. Would you mind addressing how we
23 deal with that? In other words, how can we do something that's
24 not based on evidence -- that's not based on the evidence in
25 the record?

1 MS. RIGGS: Well, I think there's some remedial
2 evidence that this Court has received in the course of this
3 process that, just like the *Covington* court accepted and the
4 Supreme Court -- the *Covington* court, just last year, made
5 findings based on evidence it received in a completely
6 analogous situation. The parties briefed, offered evidence,
7 there was a hearing, you know, and that -- the fact-finding
8 that the Court made based on that proceeding was enough to
9 satisfy --

10 JUDGE PAYNE: Where is that evidence in this case?
11 Not in your briefs, but where is the evidence? I don't see it,
12 and it just may be there's so much paper here that I may have
13 overlooked it. I understand your argument, but I don't see any
14 evidentiary grounding for it in the record that we have.

15 MS. RIGGS: I think you are right, Your Honor.
16 There's not an attachment, an exhibit that outlines the
17 neighborhood of Church Hill, but what I would say is, what's
18 more important, in my mind, is this Court saying Dr. Grofman's
19 rejection of the NAACP, simply just because of the number of
20 county splits or city splits, that, alone, doesn't make the
21 NAACP's plan illegal or illegitimate, and we may choose to
22 adopt -- and we hope you will adopt the NAACP's plan, because
23 we think this is what fully unpacks the districts. It's what
24 makes sure that the core of unconstitutional districts isn't
25 perpetuated, and it restores black voters to the place they

1 would have been but for the unconstitutional districts.

2 So I won't repeat what my colleague Mr. Hamilton
3 said, but I would reiterate there is no legal basis for this --
4 for Dr. Grofman's belief that a map must embody the minimum
5 number of changes or be narrowly tailored. That is just not
6 supported in the law.

7 JUDGE PAYNE: I thought the Supreme Court told us
8 that it had to be narrowly tailored.

9 MS. RIGGS: The use of race needs to be narrowly
10 tailored, and there's a certain --

11 JUDGE PAYNE: No, the remedy needs to be tailored to
12 address the offense as a general proposition in equity, and I
13 think the Supreme Court has said that applies in this case. So
14 his urging that we proceed with something that is narrowly
15 tailored, doesn't that comport with what we're told to do by
16 the Supreme Court?

17 MS. RIGGS: I don't think so, Your Honor,
18 respectfully. A remedial map that changed districts in
19 northern Virginia would not be narrowly tailored to addressing
20 the problems this Court has identified, but I don't think it
21 means minimum changes or you can't change -- you have to
22 minimize the number of districts changed.

23 I think the Supreme Court has also charged any court
24 acting in equity to develop a remedy to fully remedy the
25 constitutional violations. So I think we're all narrowly

1 tailored in the sense that the districts we're proposing to be
2 changed are in the areas where this Court -- and you broke it
3 into three geographic areas. We're focused on that. No one is
4 proposing northern Virginia districts.

5 Ultimately with that -- and Dr. Grofman is a renowned
6 and very talented political scientist. He's not an attorney.
7 I think based on that misunderstanding, he has inadvertently
8 preserved too much of the cores of the unconstitutional
9 districts, and I think the *Covington* decision from the U.S.
10 Supreme Court last year is consistent with what I am arguing
11 here.

12 I want to spend just a few minutes focusing on
13 Richmond in part, because I think it will crystallize some of
14 what I'm talking about, and I also think that's where most of
15 the harm is wrought in preserving the cores of the
16 unconstitutional districts and failing to allow naturally
17 occurring additional opportunity districts to emerge; that is,
18 failing to allow black voters the voice they would have had
19 were they not packed.

20 So if you'll turn with me quickly to tab one in the
21 notebook that I handed to you, this is -- these are all maps
22 that were attachments to ECF 336, and they were in our brief as
23 well. The left side is racial density maps, and the right side
24 is just shapes so that you understand. But, ultimately, what
25 we have here is a district that was 54.87 percent BVAP that is

1 now 54.01 percent BVAP, and the way that Dr. Grofman adjusts
2 this district is simply by swapping VTDs from one
3 unconstitutional district to another. So you have this set
4 of --

5 JUDGE PAYNE: Whose district is 71?

6 MS. RIGGS: We're looking at 71 right now.

7 THE COURT: Whose district is it? Is that McClellan?

8 MS. RIGGS: I'm sorry. I don't know the incumbent.

9 JUDGE PAYNE: It's important who it is, because the
10 incumbent won with something like 78 percent of the vote.
11 That's part of what was considered, I think. Are you saying --
12 you seem to be saying that the BVAP figure is too low here, and
13 when the incumbent won was huge -- may not have been
14 78 percent, may have been 60 percent, but it was an
15 overwhelming percentage that the plaintiffs touted throughout
16 their case, I think.

17 MS. RIGGS: I'm sorry if I misspoke. I actually
18 think the BVAP is still much too high. So it went from 54.87
19 only down to 54.01, and it's because Dr. Grofman simply swapped
20 majority black VTDs from the east of the district from majority
21 black VTDs from the south of the district -- from District 70
22 which is itself an unconstitutional district. He eliminates
23 the Henrico VTD split, so there's one fewer county split, but
24 there's no real effect on compactness.

25 And so ultimately, across these four unconstitutional

1 Richmond districts, what you see is swapping VTDs and
2 population between the unconstitutional districts but still
3 fencing out -- fencing in black voters in these four districts.
4 So the core of the district doesn't change, the packing doesn't
5 substantially change.

6 If you'll flip with me then to tab two --

7 JUDGE KEENAN: You are saying the core of the
8 district doesn't change, but he eliminated that whole Ratliff
9 portion of Henrico, didn't he? That's a huge change.

10 MS. RIGGS: Well, if you look at some of what the
11 Court in *Covington* discussed and the Supreme Court affirmed --

12 JUDGE PAYNE: Isn't the answer to that question yes,
13 that's a big change?

14 MS. RIGGS: I don't -- I would not quantify that as a
15 big change to the core of the district. If you look at where
16 the VTDs, the majority black VTDs in 71 in 2011, and if you
17 look at them in the special master's 1A version, which is the
18 same as his 1B version, it's not my assessment that that is a
19 significant enough change to undermine or end the perpetuation
20 of the racial segregation of black voters in Richmond.

21 And I think it's important to view these four
22 districts together, because he tends to swap between the four
23 districts, and you still have these four districts being very
24 heavily packed and white voters not being added to these
25 districts.

1 JUDGE PAYNE: How many additional majority-minority
2 districts does the NAACP plan create?

3 MS. RIGGS: It creates no new additional majority
4 black districts. It naturally creates two districts that are
5 in the mid 40 percent BVAP districts which it is our
6 assessment, looking at election results and based on the people
7 who live there, that these are two additional House of Delegate
8 districts that will elect the candidate of choice of black
9 voters.

10 I think that's consistent with what Dr. Grofman
11 testified to earlier. It's consistent with what the Princeton
12 gerrymandering project has suggested that districts in the
13 40 percent -- I think they say 37 and above --

14 JUDGE PAYNE: Are you saying that your plan doesn't
15 create any more than 12 majority-minority districts in
16 Virginia?

17 MS. RIGGS: I think it creates 14 districts that will
18 provide fair opportunity for black voters to elect their
19 candidate of choice.

20 JUDGE PAYNE: Isn't that what we're talking about?
21 We're using the shorthand majority-minority districts. You are
22 drawing a difference. I don't understand what the difference
23 is I guess is what my question is.

24 MS. RIGGS: It's a legal one. I'm not standing here
25 today telling you that the two additional districts that we

1 believe will provide black voters an opportunity to elect their
2 candidate of choice are compelled by Section 2 of the Voting
3 Rights Act, and we didn't draw them purposefully, but when we
4 fully unpacked the districts that were packed in 2011, these
5 districts naturally occurred.

6 If you go back to *Personhuballah*, the additional
7 district that Dr. Grofman drew that ended up electing another
8 African-American member to the United States Congress, he
9 didn't purposefully draw that, but when he unpacked CD 3 fully,
10 that was a district -- it was in the 40 percent BVAP range, and
11 it created an opportunity, not a guarantee but it created an
12 opportunity for black voters to elect their candidates of
13 choice.

14 It's not -- no one is saying it's compelled by the
15 Voting Rights Act, but part of being fully remedial is allowing
16 compact natural districts to occur. If you comply with
17 traditional redistricting criteria --

18 JUDGE PAYNE: Slow down.

19 MS. RIGGS: If you comply with traditional
20 redistricting criteria and end up with a 42 percent black
21 voting-age population district, and it elects a black candidate
22 for the House of Delegates, or to Congress in the
23 *Personhuballah* case, that is part of being fully remedial.

24 JUDGE KEENAN: Let me ask you a question, Ms. Riggs,
25 and I'm going to ask the other lawyers the same question. To

1 what extent in drafting the remedial plan does the Court give
2 consideration to Section 2 as well as Section 5, now-defunct
3 Section 5? What extent do we consider either or both of those
4 in terms of our remedial plan?

5 MS. RIGGS: I think you always have to consider
6 Section 2. I'm not aware of any evidence in the record before
7 you that there are any additional districts required by
8 Section 2. Now, you could have a district that violated
9 Section 2. So, for example, one of our additional districts
10 that naturally emerged in the Richmond area was District 62,
11 and it was 43 percent .1 -- 43.1 percent black voting-age
12 population.

13 If you drew a map to purposefully frustrate the
14 natural occurrence of that district, you might have a violation
15 of Section 2 as intentional vote dilution or a 14th Amendment
16 intentional discrimination case, but under the effects clause
17 of Section 2, that district isn't compelled. So I'm not aware,
18 and I'll admit I'm a nonparty, but I'm not aware of any
19 evidence that there are new districts required by Section 2.
20 Doesn't mean that there aren't, just there's no evidence of it.

21 Likewise, the legislature, when it drew the map in
22 2011, had a duty to comply with Section 5. Sitting here today,
23 Section 5 is no longer applicable to the state of Virginia, but
24 I think that, again, this Court needs to -- in understanding
25 the remedy to the constitutional violation, needs to ensure

1 that because black voters were harmed by the segregated
2 districts that were drawn in 2011, that they should take care
3 to make sure that black voters don't end up in a position that
4 they're worse off than they would have been but for the
5 unconstitutional act in 2011. So that's why I think it's
6 critically important, as Dr. Grofman testified and we agree --

7 JUDGE PAYNE: Excuse me. Are they worse off under
8 the plaintiffs' plan A or Dr. Grofman's plan 1A, Petersburg,
9 for Richmond 2 -- two for Petersburg, Peninsula 2, Norfolk 1A
10 than they were under the enacted plan according to you?

11 MS. RIGGS: No. So black voters in those 12
12 districts, the 12 districts at issue, I believe both the
13 plaintiffs' plan and Dr. Grofman's plan preserve the ability of
14 black voters to elect their candidates of choice, and so
15 they're not worse off.

16 That's a separate question, though, than whether Dr.
17 Grofman's plan fully remedies the racial gerrymandering and
18 allows these additional naturally occurring opportunity
19 districts to appear. So it's a different question.

20 JUDGE PAYNE: Who is worse off then? You are saying
21 you think somebody is worse off. Who is worse off if it's not
22 the people in the 12 districts?

23 MS. RIGGS: It's the people in the districts
24 surrounding those 12 districts that haven't been -- at least in
25 Dr. Grofman's plan, the 12 districts haven't been sufficiently

1 unpacked, and so the people in those surrounding bleached
2 districts are worse off because they haven't been restored to
3 the position they would have been but for the segregated
4 districts. If that answers your question.

5 JUDGE PAYNE: I understand it's your theory. What's
6 the evidence that supports that? Have you got any evidence in
7 the record that would allow us to make a finding of that
8 nature?

9 MS. RIGGS: We have evidence in the record that there
10 are additional districts now in our plan where black voters
11 would have a fair opportunity to elect candidates of their
12 choosing, and they are voters who would not have that
13 opportunity under Dr. Grofman's plan, and they didn't have that
14 opportunity under the 2011 plan.

15 JUDGE PAYNE: I understand.

16 MS. RIGGS: So then, to speed things along, I was
17 speaking about District 69 under tab two. Again, this is one
18 where the 2011 version has a BVAP of 54.78 percent, and Dr.
19 Grofman's version has a BVAP of 54.38. So this is, again, one
20 of those situations where we allege it's an insufficient
21 unpacking of this district.

22 I don't know the incumbent, but, Judge Payne, I
23 suspect you are right that whoever the incumbent is is winning
24 by enormous margins and that this district does not need to be
25 54.38 percent. Again, what we see is in Dr. Grofman's module,

1 he swaps majority black VTDs from the east of the district and
2 switches them to ones from the south which is, again, from
3 House District 70 another unconstitutional district.

4 In tab three, we have District 70. This is a
5 district that was 55.99 percent BVAP. Dr. Grofman lowered the
6 BVAP to 54.38, but, again, we believe this is still an
7 insufficient unpacking of the 2011 maps. He swaps -- makes
8 some swaps between 70 and 74. This is a pattern we see that
9 tends to focus on making the swaps between the unconstitutional
10 districts rather than looking to the bleached surrounding
11 districts to fix the problem.

12 One way to think about it is this way: In the
13 Richmond area, Dr. Grofman doesn't touch delegate Districts 27
14 or 68 which are each adjacent to two unconstitutional
15 districts. So by making that judgment, by saying that that's
16 required for narrowly tailoring, you are really hamstringing
17 your ability to fully remedy these four unconstitutional
18 districts.

19 All of Dr. Grofman's districts in the Richmond area
20 have BVAPs in excess of 52 percent, and I don't think there is
21 any evidence that that's necessary.

22 Lastly and quickly, if you'll turn with me to tab
23 four, this is a district that shape-wise has changed the most
24 significantly of the four districts in Richmond, and that's
25 because Charles City is given from District 74 to District 70

1 but, you know, from one unconstitutional district to another.
2 But what I'd point out to the Court is what I think is -- some
3 of the most damning evidence of racial predominance wasn't
4 really the inclusion of Charles City. It was this oddly shaped
5 appendage that runs along the border between Richmond and -- in
6 Henrico along the border of Richmond city, and Dr. Grofman, he
7 lops off the Charles City portion but doesn't change that
8 really problematic part.

9 That's exactly quite similar to a house district in
10 Covington, house district -- I'm sorry, Senate district in
11 Guilford County where there was a lop-off of an arm, appendage,
12 but the main core, the main problematic part of the district
13 remained, and the district court there found the core of the
14 unconstitutional district was -- even though the shape got
15 better, the core was still there, so it perpetuated the harm
16 and needed to be fixed. The Court, the Supreme Court summarily
17 affirmed that.

18 Lastly, one of Dr. Grofman's criticisms of the NAACP
19 map -- he had several, and I want to explain some of them. You
20 know, he criticizes the NAACP map for changing 30 districts,
21 but as a matter of law, I don't think there's a minimum number.
22 If we had changed districts in northern Virginia that would be
23 a problem, but the difference between 30 and 26 and the
24 difference between creating two new districts which will likely
25 elect the candidate of choice of black voters versus only one

1 in the Grofman modules is significant enough that the
2 difference between 26 and 30 shouldn't be legally significant.

3 JUDGE PAYNE: Do you have a case that holds that?

4 MS. RIGGS: I think both *Abrams* and *Covington* stand
5 for that, that there isn't -- that fully remedying the
6 constitutional violation trumps minimum -- the number of
7 districts affected whether they are adjacent or nonadjacent.
8 That both of those cases stand for that proposition.

9 JUDGE KEENAN: Aren't you trying to read too much
10 into *Covington*? You keep reciting *Covington*, but wasn't the
11 whole point of *Covington* the fact that the concern for the
12 prohibition on mid-decade redistricting was not a fair
13 consideration of the remedial map? Wasn't that the takeaway
14 from *Covington*?

15 MS. RIGGS: Not at all, Your Honor. There were two
16 parts to *Covington*, two parts that were appealed to the Supreme
17 Court. One was that the district court had ordered the special
18 master's maps -- and I have that -- if you look at pages -- I
19 don't have the Reporter cite, but pages two and four discuss
20 the failure to racial gerrymander and the findings that the
21 district court made about the failure to correct the racial
22 gerrymander.

23 There was another part of *Covington* that isn't
24 related to this case, that it was about the prohibition on mid
25 decade redistricting. I'm trying to focus Your Honors on the

1 first part of *Covington* which is about the Supreme Court
2 affirming the district court's decision to impose maps that
3 fully remedied the racial gerrymander.

4 JUDGE PAYNE: Would you mind just turning to your tab
5 five and telling us what all that is about, please.

6 MS. RIGGS: Yes.

7 JUDGE PAYNE: How long do you think you have left,
8 because it's the lunch hour?

9 MS. RIGGS: I think depend --

10 JUDGE PAYNE: We don't want to arbitrarily cut off
11 people, but you've had a good slug, longer than the plaintiff.

12 MS. RIGGS: Yes, Your Honors. If there are minimal
13 questions, I think I have five more minutes.

14 JUDGE PAYNE: Okay.

15 MS. RIGGS: I want to answer the Court's questions.
16 We were somewhat confused by Dr. Grofman's chart, which is on
17 the left here, in which he essentially said, well, my maps are
18 just as good, create just as many new opportunities for black
19 voters as the NAACP's maps, and we struggled to understand.

20 All of the numbers on the right, it's a
21 demonstrative, but they all come from Dr. Grofman's chart on
22 the left. The takeaway -- looking at this, the red highlighted
23 district numbers are the numbers that -- are the districts that
24 were unconstitutional --

25 JUDGE PAYNE: 75 wasn't. You've got 75 in there, and

1 the Supreme Court upheld it, didn't they?

2 MS. RIGGS: Yes, it did. I apologize. Maybe that
3 was challenged district --

4 JUDGE PAYNE: Then what are the ones -- you are on
5 the right, your chart on the right, what does that mean?

6 MS. RIGGS: So what we wanted to do was, in green,
7 our highlighting how the NAACP's map creates two new districts
8 in the forties BVAP percentage while both Dr. Grofman's 21
9 change module and 26th district change module only create one.

10 I simply wanted to point out that Dr. Grofman alleges
11 that every district that's in the 20 to 30 range is somehow a
12 benefit to black voters, and our position is that's not
13 necessarily the case, that there are lots of districts where
14 it's sort of legally and politically and practically
15 insignificant.

16 What we've done in our map is create three additional
17 of these yellow districts, but we can't tell from the data that
18 Dr. Grofman used whether any of his yellow districts are
19 actually districts that are one where black voters are having a
20 significant influence already or will have new influence that
21 they didn't have before.

22 The reason is we think that the reliance on the Obama
23 2012 election and the Fairfax 2013 election isn't that helpful,
24 in part because it's dated, in part I think, Judge Payne, it
25 was your point because those are even numbered election years,

1 not delegate election years.

2 So we talked to our clients about where in 2019, in
3 2021, where are black voters really going to have a new impact
4 where they didn't before. So it's an apples-to-oranges
5 comparison without understanding that, and I think ultimately,
6 though, the main significance is that there are two green
7 highlighted boxes on the NAACP's plan and only one on both of
8 Dr. Grofman's.

9 To conclude -- I know I've gone long, and I
10 appreciate your tolerance -- ultimately, plaintiffs and the
11 NAACP agree that Dr. Grofman's plans are better than the 2011
12 plans, but, at bottom, that's not the burden on the Court here.
13 Court-drawn plans are held to a higher standard than
14 legislatively drawn plans. That's the rule that's emerged from
15 *Wise v. Lipscomb* and *Johnson v. Miller*.

16 So it's this Court's duty to ensure that the maps
17 that you order into effect are fully remedial, that they
18 restore black voters to where they would be but for the
19 unconstitutional action in 2011. We would ask that this Court
20 order the NAACP's map into effect or potentially instruct the
21 special master to go back and revise his maps in light of some
22 instructions about the legality of changing adjacent districts
23 or not having some goal to minimize the number of districts
24 changed.

25 JUDGE PAYNE: The limit on changed districts comes

1 from the fact that you need an evidentiary base, a trial on the
2 merits as to whether or not there's an offense and what the
3 offense was, not from some arbitrary concept that the
4 limitation -- that there's a magic in limiting change, and the
5 Supreme Court has told us to do that.

6 MS. RIGGS: Yes, that's correct, and on those 11
7 unconstitutional districts, that's right. I'm talking about
8 the number -- I mean, redistricting is a domino game. You
9 can't just change one district. It's impossible. If you
10 change one district, districts around it change, and what I
11 think Dr. Grofman misunderstood was that there was some
12 requirement that he minimize the number of surrounding
13 districts.

14 Judge Payne, you asked about District 75 of
15 plaintiffs' counsel, and I wanted to answer that very quickly
16 for you. We do change House District 75. It is immediately
17 adjacent to and underneath 63, and as we read this Court's
18 discussion of why race predominated in 63, we couldn't figure
19 out a way to fix that without changing 75.

20 I believe two out of the three versions of Dr.
21 Grofman's modules also change 75, and because you asked
22 plaintiffs, it's not our preference, but if we were asked to
23 select our choices of Dr. Grofman's modules, our preferred ones
24 are Richmond 1B, Petersburg 2, Peninsula 2, and Norfolk 1B.
25 Thank you, Your Honor.

1 JUDGE PAYNE: Thank you. We'll take one hour for
2 lunch and be back at 2:10 and hear the rest of you.

3
4 (Luncheon recess.)

5
6 JUDGE PAYNE: All right, who is next? Who wants to
7 go next? Mr. Braden, Ms. McKnight?

8 JUDGE KEENAN: Ms. McKnight, if you'd be kind enough
9 to incorporate into your comments to what extent do we consider
10 Section 2 and Section 5 of the Voting Rights Act.

11 MS. McKNIGHT: Good afternoon, Your Honors. We have
12 some new friends with us today. In considering how long we
13 have been together in this case, four years, two trials, a few
14 reminders bear noting. First, this is not a case about
15 malevolent intent. Even plaintiffs agree that the map-drawers
16 in 2011 did their best and had no ill intent.

17 The only dispute in this case is about whether race
18 predominated in drawing that map, and, if so, whether the
19 resulting map is narrowly tailored to an appropriate end. So
20 this also is not a case about packing black voters into one
21 voting district or cracking them among many.

22 The map at issue was not found to, quote unquote,
23 pack black voters into as many districts as possible or
24 bleaching surrounding districts. Indeed, half the challenged
25 districts in this case going into map-drawing were above

1 55 percent BVAP, and half were below. Let me put that another
2 way. Half of the challenged districts in the enacted map had
3 BVAP that dropped. Half had BVAP that increased, and that's an
4 important reminder particularly considering some of the
5 argument that we just heard before the lunch break.

6 It's also important because that was part of the
7 underpinning of this Court's finding that some of the
8 challenged districts here acted as, quote unquote, donor
9 districts, and other of the challenged districts acted as
10 recipient districts. The only way a district could be a donor
11 district is because the BVAP was understood to be higher than
12 the BVAP it was drawn at in 2011.

13 So, again, we've seen discussions not only today but
14 in the pleadings in this remedial phase of this matter with the
15 phrase undoing packing or a focus on packing voters. But,
16 again, packing is not what is being remedied in this case, and
17 a focus on race in order to unpack black voters commits the
18 same sin that this Court identified in June.

19 Indeed, the decision to move black voters from a
20 district where they are able to elect their candidates of
21 choice to a district where they cannot simply because they are
22 black is, itself, a violation of the Constitution and the
23 Voting Rights Act. I will get back to this point as you will
24 see it in nearly every map proposed by others in this remedial
25 phase, and critically you see it throughout the maps proposed

1 by the special master.

2 This is also not a case where the Black Caucus and
3 the House of Delegates did not support this plan. They did.
4 In fact, if you recall from trial, and it's in the trial
5 record, Delegate Dance and Delegate Spruill, senior members of
6 that caucus, testified rather passionately on the floor of the
7 House in 2011 not only in support of the enacted plan but in
8 support of at least 55 percent BVAP in the districts, in the
9 challenged districts.

10 Finally, this is not a case about whether the
11 challenged districts violate traditional districting
12 principles. They do not. This Court found they do not, and
13 the Supreme Court did not disrupt that finding on appeal. So
14 what are we tasked with remedying here? There appears to be,
15 and I'll venture to say there is a fundamental misunderstanding
16 of what must be remedied at this stage.

17 Let's start with the Court's own language. Last
18 June, this Court issued an opinion finding that the equal
19 protection clause of the United States Constitution had been
20 violated because, and I quote, the state has sorted voters into
21 districts based on the color of their skin.

22 On narrow tailoring the Court found, again, quote,
23 the legislature made no effort to determine whether the
24 mechanical 55 percent racial threshold was required to comply
25 with the VRA and, instead, arbitrarily applied the same racial

1 mandate to 12 vastly dissimilar districts.

2 What this means is that any proposal that sorts
3 voters into districts based on the color of their skin is no
4 remedy here. It also means that any proposal that applies a
5 mechanical 55 percent racial threshold to 12 vastly dissimilar
6 districts is also no remedy here.

7 The only proposal made by the special master, Dr.
8 Grofman, violate both rules and, therefore, cannot be remedies
9 here. Dr. Grofman's proposals sort voters by race, and they
10 apply a mechanical racial threshold.

11 JUDGE PAYNE: I thought the sorting occurred because
12 of the traditional redistricting principles, and then it was
13 verified what the consequence was. And the consequence appears
14 to be, in part, as you say, but if the consequence is as you
15 say and there is no intentional application of race in the
16 process, how could his proposals violate the Constitution?

17 MS. McKNIGHT: Your Honor, Dr. Grofman has denied
18 that he used a 55 percent ceiling earlier today. But his
19 report shows otherwise. The numbers of his districts on his
20 districts show otherwise, and the geography shows otherwise.

21 JUDGE PAYNE: Doesn't the report show that there was
22 a ceiling, not that he arrived at that ceiling as part of the
23 process of redistricting? Isn't that the nubbin of the whole
24 remedy issue here?

25 MS. McKNIGHT: I see, Your Honor. The issue is his

1 report -- Dr. Grofman takes the position that all of his
2 districts naturally fall below 55 percent. But that is
3 contrary to the geography at issue in this case, and what I
4 mean by that is, number one, first look to the Court's own
5 opinion which found donor districts.

6 What that means when the Court finds, quote unquote,
7 donor districts is that there are areas of the state where BVAP
8 is higher than 55 percent, and the Court found that those areas
9 had to be drawn in a particular way with race predominating
10 line-drawing in order for the districts to be closer to
11 55 percent; number two, to show you examples of how geography
12 in the state naturally creates districts arriving above
13 55 percent BVAP. An example is included -- would you like me
14 to refer to you now? I'm happy to keep going.

15 JUDGE PAYNE: Whatever you want to.

16 MS. McKNIGHT: Let me reference for the record where
17 that example exists.

18 JUDGE KEENAN: Let me also ask you as you are doing
19 that, Ms. McKnight, in order to accept your position, would we
20 have to make an adverse credibility finding regarding Dr.
21 Grofman's testimony today?

22 MS. McKNIGHT: Let me address that first, because
23 obviously that has meaning to us as lawyers and as
24 representatives to this Court. First let me state that we have
25 the utmost respect for Dr. Grofman. He has an incredible

1 amount of experience in this field, and we do not seek to
2 either denigrate his character or suggest he is somehow lying.

3 I think this is best laid out in our brief, and this
4 is tab four of the binder I shared with you. There we
5 detail -- let me pull up the page.

6 JUDGE KEENAN: I don't think you are starting off
7 with an answer to the question.

8 MS. McKNIGHT: The answer is no.

9 JUDGE KEENAN: You are saying we don't have to make
10 an adverse credibility finding in order to accept your
11 position?

12 MS. McKNIGHT: Correct. You do not need to make an
13 adverse credibility finding. I believe that, and I want to be
14 exact here if you'll bear with me for a moment. We have gone
15 through his reports. We made the assertion he's applied a
16 ceiling. He came back in his reports and made certain
17 statements about that ceiling.

18 We think he never denied that there was a
19 consideration of 55 percent BVAP. In fact, he said pick my
20 plan, it stays below 55 percent BVAP. Don't pick any other
21 plans, including some of plaintiffs', including of some NAACP's
22 plan, including defendant intervenors' plans because they all
23 go above 55 percent.

24 When we read that, we see him as applying a ceiling,
25 a 55 percent ceiling. He thinks you should pick his, avoid

1 others, because 55 percent ceiling is appropriate in this case.

2 JUDGE KEENAN: But he did state today no intended
3 55 percent ceiling. That was his testimony today as my notes
4 reflect. So that's why I'm concerned. It seems to me it might
5 be a binary choice here for the Court that you are offering to
6 us, that we have to make an adverse credibility finding if we
7 are to accept your position. We'll check the record, of
8 course, and see whether my notes bear it out.

9 MS. McKNIGHT: Okay, Your Honor. Well, I will check
10 the record as well. I see his testimony today as not very
11 different from the same testimony you heard or similar
12 testimony you heard from Delegate Jones saying that there was
13 an idea that 55 percent was important, but he did not believe
14 that all of the districts he drew exceeded 55 percent. He
15 believed a few of them were below. So I considered it as very
16 similar to Delegate Jones' testimony on that point.

17 JUDGE PAYNE: But isn't it the case that we have
18 before us, both in the report of Dr. Grofman and in the
19 testimony, what he says is he drew these districts with race
20 not at issue, and he arrived at them applying good government
21 principles and the standard, the traditional redistricting
22 factors?

23 Then, after he did that, he looked at what that
24 yielded to determine what BVAP showed up there, and that's how
25 the BVAP in this case got where it got. And that was because

1 the traditional factor application produced that result upon
2 examination. And he was asked, after he did a check of his
3 work respecting the -- what he saw the BVAP had resulted in
4 whether he made any changes, and he answered that fully that he
5 made a couple of changes -- he had made a couple of changes
6 based on incumbency, and then after that he made no other
7 changes based on race.

8 And if that's the case, then I think what Judge
9 Keenan's question asks and what comes to my mind as well is, if
10 we are to accept your proposition that there was the
11 intentional use of race, not malevolent but intentional use of
12 race in arriving at these districts, we have no choice but to
13 disbelieve him and accept what you are arguing is the
14 circumstantial evidence that shows that notwithstanding what he
15 testified to, he really did use race, and I think that's
16 what -- I think, for me at least, that's something that I think
17 I'd like to hear you address in your remarks.

18 MS. McKNIGHT: Thank you, Your Honor. First of all,
19 you heard very similar testimony, if not identical testimony,
20 at trial in this case from both Delegate Jones and from John
21 Morgan which was we drew the plan, we focused on traditional
22 districting criteria, we took input from incumbents, we took
23 input from public hearings. I could go on and on, but I think
24 you get the point.

25 JUDGE PAYNE: Right, and I accepted that testimony as

1 credible, and the majority said that's not credible, and the
2 total -- and rejected it because of the evidence,
3 circumstantial evidence that shows up in those various points
4 that were referred to in one of Mr. Braden's examinations, and
5 in perspective -- considering those in perspective of the
6 statements that had been made on the House floor and otherwise.

7 So there, the lynchpin of this case is a credibility
8 determination -- I mean at the trial level, in essence. So if
9 we are not to judge Dr. Grofman's testimony, credibility
10 adversely, then how do we come to accept your position I think
11 is the question.

12 MS. McKNIGHT: Fair enough. Your Honors, clearly,
13 and pardon me. Clearly we did not agree with the majority of
14 this Court when they made their credibility determinations.
15 Candidly, we have a different position on what makes up a
16 credibility determination in testimony about these cases.

17 JUDGE PAYNE: Sure, and you can talk to the Supreme
18 Court about that. That's fine. That's just the way it all
19 works. Some of us reach one decision, some reach the other,
20 and that's what appellate courts sort out when trial courts
21 make those decisions.

22 MS. McKNIGHT: Right, and pardon me, Your Honor.
23 This is not to be pointed to the majority of the Court. I just
24 want to lay that foundation for the next point which is to the
25 extent you are going to apply a standard to Delegate Jones that

1 his testimony is not credible on these issues, you must apply
2 the same standard to Dr. Grofman that goes through the
3 analyses, that goes through what he says was his primary intent
4 and what was his secondary or third or fourth intent.

5 So to the extent the Court is consistent with its
6 position that when someone says, I drew a map with all of these
7 other priorities in mind, and then I checked the BVAP on the
8 back end, to the extent that is not credible, you need to apply
9 that same standard to Dr. Grofman and find that his testimony
10 on that point is not credible either.

11 JUDGE KEENAN: Ms. McKnight, I promise this will be
12 the last time I interrupt you, but Dr. Grofman didn't turn
13 District 95 into a frying pan handle with blacks and whites
14 separated by a highway with apartment buildings on one side and
15 single-family residences on the other side. So how can you say
16 because one person said they didn't consider race and the other
17 said they didn't consider race that the application is the
18 same?

19 It seems to me we've got to look at the results, too,
20 what did Dr. Grofman do with the district as opposed to what
21 did the intervenors do with the district, don't we?

22 MS. McKNIGHT: That's an excellent point, and as you
23 recall on the record, there were a number of other reasons why
24 District 95 was drawn that were not related to race. Also, in
25 this remedial phase, what you'll see, and I can show you a

1 couple of examples, but its throughout his plans. There are
2 decisions that Dr. Grofman made that are not consistent with
3 traditional districting criteria. There are decisions he made
4 to move black communities out of performing districts and into
5 nonperforming districts. There are decisions he made that
6 should be very concerning to this Court.

7 So just as when I talk -- you question whether we
8 should apply the same standard. You indeed should apply the
9 same standard. If you're going to apply that rigorous of a
10 standard to Delegate Jones who drew this map, received super
11 majority and bipartisan support in the legislature to have it
12 passed, you should apply that same rigorous standard to Dr.
13 Grofman who candidly, based on something that we asked and
14 other parties asked in this court, performed a very difficult
15 task in a very short period of time.

16 So I want to be fair to him, but that does not mean
17 you should ease the standard on him or on the map you plan to
18 adopt.

19 JUDGE PAYNE: I don't think we should use the
20 standard at all, but, at the outset, you told us that you are
21 not attacking Dr. Grofman's credibility, and in order to follow
22 the line that you are pressing with that argument, we have to
23 make a credibility determination. We have to find Dr. Grofman
24 did things that had racial consequences and did that
25 intentionally; right?

1 MS. McKNIGHT: That's correct, Your Honor.

2 JUDGE PAYNE: Okay.

3 MS. McKNIGHT: That's correct. Let's look at a few
4 examples. These won't be new to you. You looked at them
5 earlier today. I'll try to be clear. I will raise two
6 examples with you. I'll identify the two pages at the outset
7 where to find them, I'll wait for you to find the pages, and
8 then I'll go on, and I'll try to keep this fairly streamlined.

9 I am looking in the hearing binder -- this is
10 defendant intervenors' hearing binder. I am looking at tab
11 four, and I'm going to show you pages in Exhibit C and D. So
12 if you could flip to those exhibits --

13 JUDGE PAYNE: They are back in the back.

14 MS. McKNIGHT: Correct, Your Honor. This is tab
15 four, this is docket number 337, and I am looking at Exhibit C,
16 page two of two, in the ECF header.

17 JUDGE PAYNE: That's docket 337-3.

18 MS. McKNIGHT: Correct. I'm also looking at Exhibit
19 D, and, here, this is document number 337-4, and I'm looking at
20 page three of 14.

21 JUDGE PAYNE: All right.

22 MS. McKNIGHT: You have already looked at this with
23 Dr. Grofman's examination, but let me set the stage. Exhibit C
24 is showing you HB 7002 compared with the special master's
25 Petersburg 2. This is meaningful because Dr. Grofman has

1 identified Petersburg 2 as somewhat of a consensus map.

2 Plaintiffs, the NAACP, and others support Petersburg 2.

3 As you know, Dr. Grofman received proposed maps from
4 other parties before he drew his map. So he received HB 7002.
5 So when we looked at his Petersburg 2 and compared it with HB
6 7002, it was remarkable that most of his changes were identical
7 to HB 7002. He got rid of that so-called finger that extended
8 out of HD 75 or that was in HD 63. All of the yellow part of
9 this map is consistent between HD 7002 and the special master.

10 What is different is what I'd like the Court to focus
11 on. HB 7002 is the portion of the map that is yellow and red.
12 It makes up a relatively tidy district. It's highly compact,
13 both visually and by numbers. It hits population just right.
14 Traditional districting criteria is met. You see a lack of VTD
15 splits.

16 What's interesting is that Dr. Grofman chose to split
17 the Winfrees Store VTD -- and that is shown in Exhibit C,
18 document 337-3, page two of two -- down the line between the
19 yellow portion of the map and the red portion of the map, and
20 once he had done that and gotten rid of the red portion of the
21 map, he had to get the population from somewhere else. And he
22 got it up in the northwest corner in a section you can see
23 marked Winterpock. That whole green area is added to the
24 special master's plan. As you can see, this adjustment
25 decreases compactness and splits a VTD. Those two points

1 should be fatal. But it's even worse.

2 If you go to Exhibit D, document number 337-4, page
3 three of 14, you'll see the same outline of the special
4 master's Petersburg 2 detailed here, and you'll see that where
5 he decided to split the VTD is precisely along the border with
6 a black community. He has moved that community outside of HD
7 63 and, instead, reached up over into the northwest and
8 captured a large amount, large swaths of communities where
9 there are very low BVAP numbers.

10 Why did he do this? These are the same questions the
11 Court asked of Delegate Jones at trial, and this analysis that
12 I'm walking through is the same that was done at trial. So I
13 can appreciate that someone new to this case may feel that my
14 looking at these maps in this way is somehow unfair or
15 irrelevant. It's just a VTD split after all.

16 But this is precisely the type of analysis that was
17 advanced by plaintiffs at trial and that was adopted by this
18 Court. VTD splits matter. Where they were split, why they
19 were split, they matter. Even where the map drawer says I did
20 not split that based on race-based reasons, if the map shows
21 different, it's likely different.

22 Now, Dr. Grofman testified he minimized VTD splits.
23 He said they are minor, they are usually technical, but, again,
24 this is not enough according to this Court. It's not enough,
25 according to plaintiffs, to show a lack of racial predominance.

1 JUDGE PAYNE: Let's assume for the moment that upon
2 analysis, we see each of the special master's recommendations
3 as containing a racial effect that is exactly what you say it
4 is. Is that sufficient to render it unconstitutional and,
5 therefore, an improper remedy which is what you argue? You
6 want. You want a remedy. You say it's intentional. Suppose
7 we just find, well, it happened, we buy the testimony, and we
8 say this is how it happened, but we're not going to find that
9 there's -- wasn't any intent to it. Intervenor defendants are
10 right, that's exactly the result they argued for and said was
11 right. What happens then in our remedy decision?

12 MS. McKNIGHT: Pardon me, Your Honor. What happens
13 if you decide that he did have an intent --

14 JUDGE PAYNE: No, we can't find any evidence -- let's
15 suppose we find no evidence of intent, but there's beyond
16 question the racial effect that you talk about; that is, the
17 consequence of the split results in the racial divisions of
18 about which you speak. Let's suppose we buy all of that, but
19 we don't find that it was accompanied by an animus. Is that
20 sufficient to render -- you say then that because there's this
21 racial effect accompanied by intent, it's unconstitutional just
22 like the original unconstitutional finding of the majority.
23 But what happens if the intent element is not present? What
24 happens to your argument?

25 MS. McKNIGHT: Well, Your Honor, I think you would

1 need to focus on whether -- first, whether it remedies the
2 violations. Is it a remedy. Whether you agree with us about
3 intent or not, there still needs to be a focus on do these
4 districts remedy, and we don't think they remedy the violation.

5 The next example I'd like to bring you to, and the
6 final one and I'll move on, is HD 92. We are still in tab
7 four. I am now going to look at Exhibit D which is document
8 number 337-4 at page 13 of 14, and I'm going to look at Exhibit
9 B, page 21 of 24.

10 JUDGE PAYNE: That's Newport News?

11 MS. McKNIGHT: Your Honor, this is District 92.

12 So --

13 JUDGE PAYNE: Exhibit B, which page?

14 MS. McKNIGHT: 21 of 24 in the ECF header of Exhibit
15 B.

16 JUDGE PAYNE: Page 13 for me of D is entitled Newport
17 1A-HD 92 percent black by block, and page 21 of Exhibit B is
18 Peninsula 1A-HD enacted with special master; is that right?

19 MS. McKNIGHT: That's correct, Your Honor. Thank
20 you. Here, again, by reviewing these two maps, you will see
21 heavily populated higher BVAP Hampton city is removed from HD
22 92 and placed in HD 91, an admittedly, by all sides,
23 nonperforming district. It bears noting that this portion of
24 Hampton city has been in HD 92 for decades. So why --

25 JUDGE PAYNE: Is it a split of Hampton city, or you

1 say -- one time you referred to it as a portion of Hampton
2 city, and the other time you say they moved Hampton city.
3 Which is it?

4 MS. McKNIGHT: Your Honor, I think this may hinge on
5 our agreement with plaintiffs, after looking at the map, about
6 the boundaries of Hampton city.

7 JUDGE PAYNE: What is your view?

8 MS. McKNIGHT: I believe it's a majority of Hampton
9 city. I think you see it by the map.

10 JUDGE PAYNE: All right.

11 MS. McKNIGHT: So why did Dr. Grofman do this? He
12 tells us that his drawing of HD 92 naturally falls at or below
13 55 percent. But as we've shown in our pleadings, in both
14 exhibits attached to it and in the brief itself, there are many
15 ways of drawing HD 92. Most of them fall above 55 percent.
16 What I mean by that: If you turn to page 11 of 30 in tab four,
17 so this is tab four, docket 337.

18 JUDGE PAYNE: Is this 4-D?

19 MS. McKNIGHT: This is four. This is just the brief
20 behind tab four.

21 JUDGE PAYNE: Oh, okay.

22 MS. McKNIGHT: So this is page nine of the brief, but
23 docket number 337, page 11 of 30, you'll see here a description
24 of the problem of what we're trying to identify for the Court.
25 The benchmark version of HD 92 is over 60 percent. The enacted

1 version of HD 92 was also over 60 percent.

2 Exhibit A to this brief shows you three examples of
3 highly compact districts within Hampton city that all fall
4 respectively at 58.37 percent BVAP, 60.28 percent BVAP, and
5 60.72. I'm spending time on this point because it is important
6 to understand when Dr. Grofman talks about natural districting,
7 there are ways, natural districting ways to draw these
8 districts where they fall above 55 percent, and 92 is an
9 example of not only a way it can be done but a way where the
10 geography of the district dictates a district above 55 percent.
11 It's shown by the benchmark plan, the enacted plan, these three
12 examples. You can look at all of them.

13 JUDGE PAYNE: The geography meaning keeping the city
14 together. Is that what you are talking about?

15 MS. McKNIGHT: It's partly keeping the city together.
16 It's also partly -- and if you look at Exhibit A, the examples
17 there, what you see here are different ways to draw this
18 district where it captures parts of the city that have been in
19 HD 92, again, for decades.

20 JUDGE PAYNE: Does it split the city?

21 MS. McKNIGHT: I don't believe it does, Your Honor,
22 but I believe this is wholly within the city. But, Your Honor,
23 I will need to check.

24 JUDGE PAYNE: All right.

25 MS. McKNIGHT: The point being that there are

1 districts, and this goes back to the Court's donor and
2 recipient finding in this case. There are areas of this state
3 where BVAP in districts naturally falls above 55 percent. This
4 is so in HD 92. I'd like to ask you to turn to tab four,
5 Exhibit G.

6 Now, in this exhibit, we have spared the Court about
7 74 pages of data output from the different plans from the
8 special master and only included the page with the averages.
9 For the record, those charts are on file with the Court at this
10 docket number, 337-7, pages three through 74. The reason I'm
11 drawing your attention to this section of the brief is because
12 it is remarkable that the special master who was asked to draw
13 a plan to remedy violations found in 11 districts has somehow
14 changed non-challenged districts more than challenged
15 districts.

16 These percentages here that he changed non-challenged
17 districts 33.53 percent and changed challenged districts
18 31.21 percent on average, which means there are a lot of
19 districts above those numbers that were changed, that were
20 changed at a rate above those numbers, represent real people.

21 In non-challenged districts, Dr. Grofman has moved
22 26,743 voters into new districts. I want to pause here for a
23 moment. When we talk about a core retention, we often focus on
24 district numbers, is 66 like the old 66, and we often focus on
25 incumbents. We don't always recognize that we are talking

1 about people and where they expect to vote, who they expect to
2 vote with, and who they expect to vote for.

3 In Dr. Grofman's proposed plans, on average he moves
4 26,743 people in non-challenged districts into new districts.
5 As for the challenged districts, he moves 24,809 people. All
6 those expectations I was just describing has just changed or
7 will change for over 24,000 people in challenged districts.

8 Now, it is possible to remedy the violation
9 identified by the Court, comply with traditional redistricting
10 criteria without disrupting the electoral expectations of so
11 many people. It's possible to do this, too, so that more
12 changes are made within the challenged districts where people
13 know their districts are challenged and may expect some change
14 than in non-challenged districts where people do not have the
15 same understanding.

16 On this point, I'd refer you to tab four, our brief.
17 This is docket number 337, page 27 of 30. Here, you will see
18 the numbers for HB 7002 where, on average, about 18,500
19 residents will be affected in challenged districts and about
20 14,400 in non-challenged.

21 JUDGE PAYNE: What page did you say?

22 MS. McKNIGHT: This is document number 337, page 27
23 of 30.

24 JUDGE PAYNE: Using the ECF system?

25 MS. McKNIGHT: Correct, Your Honor.

1 JUDGE PAYNE: What plan is this?

2 MS. McKNIGHT: This is HB 7002. The first full
3 paragraph compares the changes made on average in the special
4 master's plan to the changes made on average in HB 7002. We
5 urge the Court to recognize that this kind of change for voters
6 is meaningful to them and disrupts their expectations. So
7 limiting the number of residents who are impacted by this new
8 plan is something for the Court to consider and hold as
9 important.

10 While I'm on this point, Dr. Grofman conceded this
11 morning that he did not look at core retention, and, again,
12 oftentimes people think of core retention just in terms of the
13 district's shape or the incumbent and don't consider the number
14 of voters who are affected.

15 Counsel to the NAACP discussed core retention as well
16 and had a concern about returning voters and residents to the
17 place they were without the harm that was found by the Court.
18 On this point, it's necessary to understand that core retention
19 in the enacted plan was very high, meaning that these cores
20 predate the harm that the Court found.

21 I'd like to talk briefly about HB 7002. It addresses
22 the most violations and is the least changed plan on the
23 record. It is our position that the only way to draw Dr.
24 Grofman's plan is by using a racial goal, a 55 percent BVAP
25 ceiling, and it's evident in at least the districts that were

1 considered donor districts and now have under 55 percent BVAP
2 in his proposed remedy.

3 His decision to draw the districts in this way had a
4 direct and significant impact on the drawing of the lines.
5 This is prohibited. See the Alabama case out of the Supreme
6 Court. Plaintiffs' counsel earlier today minimizes this
7 Court's detailed opinion. He claims that defendant
8 intervenors' effort to comply with it amounted to tidying up a
9 crime scene. Quite the opposite. This Court's opinion details
10 the harm that it believes voters suffered in these districts.

11 The only way to alleviate that harm is to -- and to
12 place the harmed in the position they would have been in
13 without the violation, which is what counsel for the NAACP just
14 asked for, is by fixing these flaws that the Court found in its
15 June opinion.

16 JUDGE KEENAN: But the Supreme Court also injected
17 the concept of the holistic analysis and how we have to look at
18 the district as a whole. So in terms of a remedy, how do we
19 balance that with what you are pointing out as you see the need
20 to correct the technical or the intentional, whichever issues?

21 MS. McKNIGHT: Thank you, Your Honor. I don't see
22 those two as exclusive of one another. I think the Court must
23 remedy the harm that it identified. It would be no remedy even
24 if holistically a district looked fine, which, candidly, was
25 our position of enacted districts at trial, if that district

1 does not remedy the harm that the Court found, and in many
2 cases, there are lines that are carried over, not just any line
3 but lines that this Court identified as showing improper racial
4 motive and as harming voters and residents. Those lines are
5 carried forward in the special master's plans, and that is a
6 concern.

7 In case it isn't clear, only HB 7002 retains 12
8 majority-minority districts. I saw some questions of this to
9 the counsel to the NAACP about how many majority-minority
10 districts exist in the NAACP proposed plans. The answer, by
11 our reading of their brief at docket 286, page eight of 29, is
12 three. Three majority-minority districts.

13 JUDGE PAYNE: Three new ones or three total?

14 MS. McKNIGHT: Total. Again, that's docket 286, page
15 eight of 29. Your Honor, I just ask indulgence for a few more
16 minutes. I believe I only have about five or ten more minutes
17 absent questions.

18 As you know, this is a case about motive, it's a case
19 about intent. We can't go back and remedy what was in the
20 minds of map drawers in 2011 just as we can't go back and
21 remedy what was in -- remedy what was in Dr. Grofman's mind in
22 drawing his own maps.

23 The only way to remedy the harm that the Court found
24 is by addressing what the Court found to be the direct and
25 significant impact of that motive. HB 7002 is the only

1 proposal that does this. No other plan put before you by any
2 other party or nonparty in this remedy phase even suggests that
3 they tried to address the problems, the harms identified by
4 this Court.

5 I'd like to get to your question, Judge Keenan, about
6 Section 2 and Section 5. I would urge the Court to go back to
7 our briefing on this matter. As you can appreciate from
8 argument today, from the briefing, this is a complicated area,
9 and, candidly, the ground has shifted even in the past few
10 years, even since *Personhuballah*, even since 2011 when the map
11 was drawn.

12 So I urge you to rely on arguments in our briefs, but
13 let me say this: On Section 2 -- and for reference, one of the
14 areas where we lay out where we see the burdens lying is in
15 docket 327, pages 15 to 21 of 30.

16 For your reference, this is in the hearing binder I
17 provided the Court. It's at tab three in the hearing binder.
18 That's where our brief is. Again, the pages are 15 of 30 to 21
19 of 30 in the ECF header.

20 Candidly, we view Dr. Grofman as having two choices
21 as to Section 2. He can either look at the districts at issue,
22 decide that *Gingles* elements are met and draw districts at
23 50 percent BVAP or higher. The second choice is he can look at
24 the *Gingles* elements and the factors and decide that they are
25 not met, and then he should not consider race. Those are his

1 choices.

2 Instead, he got himself into a position of finding --
3 we believe he found them, or at least suggesting that *Gingles*
4 elements are met but then drawing districts below 50 percent.
5 Again, I urge you to look at our brief, but this is
6 problematic.

7 Now, as to Section 5, as we know, it is no longer
8 applicable, but it was certainly applicable in 2011. And it
9 prohibits retrogression without further analysis, specifically
10 analyses of racial block voting, also racially polarized
11 voting, without that analysis. The House of Delegates was
12 required to draw districts above 50 percent. It could not draw
13 --

14 JUDGE PAYNE: The retrogression provision of the VRA
15 is in Section 5; right?

16 MS. McKNIGHT: Correct.

17 JUDGE PAYNE: Is it dead? Is that part of Section 5
18 dead? If it is, why do we consider it at the remedy stage at
19 all, and what purpose is there in going through this whole
20 process of looking at BVAP if that section doesn't stay alive?

21 MS. McKNIGHT: Well, you still need to look at BVAP
22 for Section 2.

23 JUDGE PAYNE: But this case doesn't involve
24 Section 2.

25 MS. McKNIGHT: For a remedy, in drawing a remedy.

1 JUDGE PAYNE: But in terms of Section 5, it was one
2 thing to say the Court -- the General Assembly had to apply --
3 live by Section 5 when it submitted its plan, and we had to
4 assess whether compliance with Section 5 was a legitimate
5 state, a compelling state interest.

6 It's quite another to say that a dead section of the
7 law applies in applying a remedy, and I don't see that any of
8 you have addressed either one of those questions at all and how
9 that applies to where we stand now, or is it that the only
10 thing of Section 5 that's dead is the preclearance requirement?
11 In other words, what did *Shelby County* do? Did it eliminate
12 Section 5 completely?

13 If it did, why are we even considering it in the
14 remedies stage of this hearing? I don't see that addressed in
15 the brief, or if it is, I didn't read it right or it was
16 obliquely presented. Can you help me out with that? I
17 intended to ask Mr. Hamilton and neglected, but I'll give him a
18 chance later.

19 So your position is -- Mr. Braden is over there
20 shaking his head -- is that Section 5, the retrogression
21 provision, is dead and is of no effect by virtue of *Shelby*
22 *County* and we don't pay any attention to it. Is that your
23 position or not, or do you want to go talk with him?

24 MS. McKNIGHT: Pardon me, Your Honor. I beg your
25 indulgence. Sorry, Your Honor, I wanted to confirm before I

1 went out on a ledge I had not discussed yet. For purposes of
2 remedy, it is dead.

3 JUDGE PAYNE: So that means then that we do not have
4 to consider any retrogression issue at all; is that right?

5 MS. McKNIGHT: That's our understanding.

6 JUDGE PAYNE: But we do have to consider whether a
7 remedy operates to produce dilution of the vote in any area;
8 right?

9 MS. McKNIGHT: Correct.

10 JUDGE PAYNE: Nobody has talked about all this in
11 their briefs. We talk about -- we need to adjust BVAP because
12 why? Because you have to adjust BVAP because that prevents
13 retrogression. But if you don't have to prevent retrogression,
14 why do you even have to deal with BVAP? Why don't you just
15 analyze the whole thing as a dilution issue?

16 Those are questions that I have about the whole case,
17 and I didn't see it addressed in the brief. Until you started
18 arguing, I thought, well, maybe I just didn't understand *Shelby*
19 *County*, but at least now I understand it the way you understand
20 it, or I think I do. So I'll be quiet and give you an
21 opportunity to speak on the topic.

22 MS. McKNIGHT: Well, thank you, Your Honor. Your
23 points are well taken. Candidly, I was addressing Section 5.
24 I want to address it based on a question about Section 2 and
25 Section 5. We'll hear from Mr. Hamilton what he believes about

1 whether retrogression applies in the remedy phase.

2 As far as whether or not to look at BVAP, I do think
3 that it's still part of the analysis. I think that Grofman
4 still -- pardon me, Dr. Grofman still has these choices and
5 still must pay attention to it.

6 JUDGE PAYNE: That proceeds on the premise that to
7 remedy a violation in the past, one looks at the law at the
8 time of the violation; is that what we're talking about?

9 MS. McKNIGHT: I was talking about Section 2, that
10 Section 2 still applies.

11 JUDGE PAYNE: All right.

12 MS. McKNIGHT: We've been talking a lot about Dr.
13 Grofman's testimony, and a lot of it sounds remarkably
14 familiar. He denies race predominated in his map drawing, and
15 so did the 2011 map drawers. He says he checked BVAP at the
16 back end. So did the 2011 map drawers. He says VTD splits are
17 too minor and technical to rise to the level of racial
18 predominance. The 2011 map drawers said the same thing.

19 He says that race could not predominate his line
20 drawing because traditional districting criteria was met. So,
21 too, is the enacted map. Simply put, this is not enough, and
22 the Court must look at the lines drawn, what they look like,
23 whether an intent to draw the lines under a 55 percent BVAP had
24 a direct and substantial impact on the line drawing. We offer
25 that it did, and the Court need look no further than the

1 districts found to be donor districts which are now drawn below
2 55 percent BVAP.

3 We may have our disagreements about liability, but
4 surely we can agree this is not what the Court intended,
5 replacing one racially sorted map with another. There are
6 problems with Dr. Grofman's plans in this case. They are
7 serious, some rising to the level of creating new
8 constitutional causes of action for black communities who,
9 because they are black, simply because of that, have been
10 removed from performing districts and placed in districts where
11 they have no hope of electing their preferred candidates of
12 choice.

13 We ask the Court to delay issuing a remedy in this
14 case until after the Supreme Court rules and after this Court
15 has had time to resolve the various and numerous problems that
16 plague every proposed map but HB 7002. What do I mean by that?
17 That is the only map that was drawn without race as a
18 consideration. You have a sworn affidavit from the map drawer.
19 Every other map in this case was drawn with race as a
20 consideration, and we simply do not have the testimony or
21 briefing or evidence or exhibits on the record supporting those
22 findings of a race-based drawing -- that race-based drawing.

23 In the alternative, we ask --

24 JUDGE PAYNE: Excuse me. You take the view we can't
25 consider the special master's report and testimony as evidence?

1 MS. McKNIGHT: No, Your Honor.

2 JUDGE PAYNE: We can consider what's in the special
3 master's report as evidence, can't we?

4 MS. McKNIGHT: Of course.

5 JUDGE PAYNE: I misunderstood you then.

6 MS. McKNIGHT: We just believe it shows that his line
7 drawing was governed by a 55 percent ceiling as opposed to a
8 55 percent floor that this Court found. It's swapping one type
9 of racial sorting for another, but it's two sides of the same
10 coin, the same problem the Court identified last June.

11 Finally, we ask that in the alternative, the Court
12 adopt HB 7002 as a remedy. Thank you very much, Your Honors.

13 JUDGE PAYNE: What do you think about -- assuming for
14 the moment that your argument doesn't prevail as to House
15 Bill 7002. Which of the options posited by Dr. Grofman would
16 you prefer?

17 MS. McKNIGHT: Your Honor, I don't have an answer for
18 that right now.

19 JUDGE PAYNE: All right.

20 MS. McKNIGHT: Candidly, at the very least, I think
21 Petersburg 2 is highly problematic. There are others that are
22 problematic as well. We would prefer HB 7002, but as far as
23 prioritizing the 36 different modules, we have not done that
24 yet, Your Honor, but we would be happy to supplement the record
25 with that.

1 JUDGE PAYNE: Thank you.

2 THE COURT: All right, who is next? Mr. Heytens?
3 How about, Mr. Heytens, what is your view on the role, if any,
4 of Section 5 of the Voting Rights Act in this case?

5 MR. HEYTENS: Good afternoon, Your Honors, and may it
6 please the Court, our view is that Section 5 is no longer
7 legally operative as a result of the Supreme Court's decision
8 in *Shelby County*.

9 JUDGE PAYNE: And is the retrogression provision of
10 the Voting Rights Act in Section 5?

11 MR. HEYTENS: That is my understanding, Your Honor.

12 JUDGE PAYNE: Why are we considering whether or not a
13 district ought to protect against retrogression of minority
14 voting?

15 MR. HEYTENS: Well, Your Honor, I think it's
16 necessary to distinguish between two questions which is
17 between, first, whether Section 5 is still legally operative
18 and binding on the Commonwealth of Virginia, and I think as a
19 result of *Shelby County*, it is not.

20 The second question is that what this Court needs to
21 do as part of framing an appropriate remedy to the
22 constitutional violation that the Court found. So to the
23 extent there was a racial component to the violation, we think
24 this Court, perhaps by necessity, has to consider a racial
25 component in undoing the harm and the violation that was found,

1 not because Section 5, of its own accord, is applicable,
2 because I don't think it is for the reasons Your Honor has
3 said. So that would be the reason, but not because --

4 JUDGE PAYNE: Why? What law says that has to happen
5 now that Section 5 is gone?

6 MR. HEYTENS: Your Honor, I think it just fits with
7 the nature of the equity remedy is to remedy the violation
8 found by the Court. So to the extent --

9 JUDGE PAYNE: I can remedy the violation found by the
10 Court by following traditional redistricting policies and
11 paying no attention whatsoever to what the BVAP population is.
12 Would that be possible? Could I do that?

13 MR. HEYTENS: I wouldn't want to say that it would be
14 literally impossible in any case to do that, Your Honor. I
15 have to -- under the facts and circumstances -- it would vary
16 under the facts and circumstances of the case given the nature
17 of the violation and given the nature of the Court's remedial
18 task, and I think fundamentally that is what the special master
19 said both in his report and during his testimony today that he
20 did, that he drew districts --

21 JUDGE PAYNE: What law says that we pay attention to
22 BVAP now that Section 5 has been eliminated in your view?

23 MR. HEYTENS: Your Honor, I'm not sure that BVAP
24 itself is necessarily a legally salient category.

25 JUDGE PAYNE: But, Mr. Heytens, BVAP pervades almost

1 all the pages of the special master's report and all of the
2 addenda and all of the briefing in this case.

3 MR. HEYTENS: I certainly don't take any issue with
4 that, Your Honor. I agree with you. I think that is, to some
5 degree, a necessary consequence of the nature of the violation
6 that the Court found in its remedial -- excuse me, in its
7 liability determination.

8 The liability determination was, as I read it,
9 insignificant measure based on the prevalent use of the
10 55 percent BVAP in the challenged districts. So I think in
11 order to explain how those violations have been remedied, a
12 violation that was, itself, in part, a significant part, I
13 would submit, determined by the use of a BVAP threshold, that a
14 remedy would, by necessity, also require some consideration of
15 the same thing.

16 JUDGE PAYNE: To do what? To say we've looked at the
17 districts drawn by traditional means, and we have concluded
18 that they're satisfactory, and, by the way, they're not near
19 the BVAP levels that were involved, and that's the end of it?
20 Is that what we do?

21 MR. HEYTENS: That's what I understand the special
22 master to have done, Your Honor, and, yes, I think that --
23 that, I think, would be an accurate characterization of how I
24 would see the law, and that's perfectly consistent with what I
25 understand the special master to have said both in his report

1 and his testimony.

2 I just have one very quick point -- I know the hour
3 is late -- that I'd like to emphasize for the Court this
4 afternoon and then, obviously, answer any questions the Court
5 has. The point that I would like to underscore on behalf of
6 the defendants is that time is of the essence here and that
7 every day counts at this point. So we would urge the Court to
8 adopt a final remedial plan as soon as possible and by the end
9 of January if at all possible.

10 JUDGE PAYNE: What do you see is the timeline for an
11 opinion for the election to run smoothly under the current
12 configuration of dates?

13 MR. HEYTENS: Well, Your Honor, we think that under
14 -- that's the reason we suggest the end of January. We are
15 confident that a smooth -- that would allow a smooth timeline
16 under the current configuration of dates for two reasons: One,
17 as this Court knows, Virginia's 2019 election season has
18 already begun. It actually began last week.

19 And, second, the administrative tasks confronting
20 state and local election officials in this case will be
21 significantly larger than the task in the *Personhuballah*
22 litigation because of the number of districts involved and the
23 number of voters involved. Having remedial maps in place by
24 the end of January will permit candidates to collect the
25 necessary signatures from voters within the correct districts.

1 THE COURT: When do they have to tender those?

2 MR. HEYTENS: The deadline for that, Your Honor, is
3 March 28th. That's under Virginia Code 24.2-522.

4 JUDGE KEENAN: They've already begun collecting the
5 signatures as of January 2nd.

6 MR. HEYTENS: That is correct, Judge Keenan, yes.
7 The second thing that has to happen is political parties have
8 to designate their nomination method. The deadline for that
9 that, under state law, is February 26th. So having a map in
10 place by the end of January will allow parties a reasonable
11 amount of time to know what their districts are and to make the
12 decisions about what method of nomination to select.

13 JUDGE PAYNE: What does having the map in place have
14 to do with deciding what method of election you want to follow
15 out of the ones that are available under the Virginia Code?

16 MR. HEYTENS: Your Honor, I don't want to speak for
17 the decisions that different party committees may make, but I
18 can at least imagine a world where, depending on the amount,
19 nature, and extent of change to their district, that could
20 affect their assessment of what method of nomination they want
21 to use.

22 I can't say that it's impossible that that's
23 something a party committee would take into account in making
24 that determination, and this would allow them to do that.

25 Third, and relatedly, having a map in place by the

1 end of January will allow state election officials ample time
2 to verify that voters have been assigned to the correct
3 districts and to then recheck to make sure that voters are
4 assigned to the correct districts and, thus, minimize
5 challenges that happen as we move into the absentee voter
6 period which the period of making those ballots available by
7 the parties is April 27th, but there is work that has to be
8 done before that can happen on the front end by state and local
9 election officials.

10 JUDGE PAYNE: What is the absentee ballot period that
11 you speak of?

12 MR. HEYTENS: This is the period on which general
13 registrars must make the primary absentee ballot available.
14 I'm sorry, Your Honor. That is April 27th is the date that
15 that has to occur by. But we've been advised by the state
16 election officials that, of course, having them ready by that
17 date requires lead time to make sure that people can be
18 assigned to the correct place, assigned the correct ballot, and
19 that sort of thing.

20 In closing, I'll just say we recognize that that is a
21 tight turnaround time. That is why we've suggested that if
22 necessary, and only if necessary, this Court could do what the
23 Fourth Circuit has done in at least two recent cases, both
24 captioned *Sierra Club*, in which the Court issued an order -- in
25 this case, we would submit the Court could issue an order

1 adopting a map for the reasons to be explained in a forthcoming
2 opinion. We think that's one option the Court could follow.

3 We cited those two cases in our brief where the
4 Fourth Circuit has done so recently in cases involving, I
5 believe both involving the Mountain Valley pipeline. Unless
6 the Court has any further questions, we respectfully yield back
7 our time.

8 JUDGE KEENAN: Mr. Heytens, I have a question just of
9 logistics. If this Court were to accept some or all of the
10 different configurations proposed by this special master, the
11 special master is then going to have to put it together. The
12 parties are going to have to be able to respond to what the
13 special master has done. So I don't know how we issue an order
14 until we consider what everybody has said about the final
15 product should we go the special master route. Do you see the
16 problem?

17 MR. HEYTENS: I think I do, Judge Keenan.
18 Fundamentally, as I understand, the special master is an agent
19 and officer of the Court, and the Court can direct the special
20 master as it deems appropriate. So, Judge Keenan, one
21 possibility that occurs to me, the Court could direct the
22 special master to prepare a final proposal in light of guidance
23 from the Court, and given the extensive briefing and argument
24 the Court has heard, I'm not sure that the Court would need
25 additional argument after it directs the special master to do

1 that. Once he prepares a proposed final map perhaps is the
2 best way to say it. I think you are right. The Court may deem
3 it appropriate to have a limited, we would stress, emphasize,
4 and hope, an extremely limited period of time for the parties
5 to be allowed to weigh in on that.

6 I realize there is a scheduling -- a question of how
7 the Court does that, but our fundamental submission would be to
8 urge the Court to do it in as expeditious of a manner as
9 possible mindful that this litigation has been going on for a
10 very long time and that the Court's liability decision was,
11 after all, rendered last June. If the Court has no further
12 questions, thank you very much.

13 JUDGE PAYNE: Excuse me. There's another option,
14 isn't there? Can't the Court order -- change the dates for the
15 election process in Virginia?

16 MR. HEYTENS: We certainly don't take issue with the
17 fact that the Court would have the power to do that if the
18 Court determined that it was necessary to do so. Our
19 submission is that at this point, there is no necessity to do
20 so and that the Court should be reluctant to do so unless there
21 is a compelling need. Again, we think the overriding
22 compelling need here is to ensure that Virginia does not have
23 another election held under unconstitutional maps.

24 That's the overriding need, but the secondary need
25 would be to maintain the orderly election process to the

1 greatest extent that is consistent with the need to make sure
2 that doesn't happen.

3 JUDGE KEENAN: Let me follow up, if I could, on that
4 then. It looks to me like the first really hard date is
5 February 26th, because the candidates have already started
6 collecting their signatures. So if there is any room within
7 the schedule, since they're going to have to start over again
8 anyway, and they have until March 28th to do it, that perhaps
9 the wiggle room in the schedule is between today and
10 February 26th, and then the Court could keep -- I mean the
11 Commonwealth could keep on its schedule without creating any
12 disruption other than the fact that the prospective candidates
13 will have somewhat less time to reconfigure their petition.

14 MR. HEYTENS: Judge Keenan, I certainly agree with
15 you that February 26th is the first hard deadline, 100 percent
16 agree with you on that. I would say based on conversations
17 with the election officials, it is a complicated, interrelated
18 moving process, so every day does count. So late February is
19 worse than early February, but I agree with you that
20 February 26th is the first hard deadline.

21 JUDGE KEENAN: And I wasn't suggesting February 26th
22 for an opinion of the Court but only to say that perhaps
23 January 31st is not a so-called drop-dead date.

24 MR. HEYTENS: I certainly agree with that, Judge
25 Keenan, yes. Thank you very much.

1 JUDGE PAYNE: Mr. Hamilton, I'm very interested in
2 your views on the effect of Section 5 and the absence in these
3 proceedings of any discussion of why we're considering BVAP
4 since retrogression isn't any longer an issue, according to
5 your opponents, and we need to consider all that under
6 Section 2. What do you have to say with that, about that, sir?

7 MR. HAMILTON: Black voting age population is central
8 to this case, and it has been since the very first part. This
9 is a *Shaw* claim, and the central thesis of the plaintiffs' case
10 and I think the majority opinion was that race was the
11 predominate factor in drawing the districts. So that explains
12 probably 90 percent of the BVAP numbers scattered throughout
13 the briefing in the record.

14 *Shelby County* invalidated the coverage formula for
15 Section 5. It didn't invalidate Section 5 itself, but as a
16 result of the invalidation of the coverage formula, the
17 Commonwealth of Virginia is no longer covered by Section 5, and
18 I don't believe as a result it would technically apply to this
19 Court in drawing this map. That's not to say that Dr. Grofman
20 did anything wrong in checking his work to ensure that there
21 was no vote dilution. I do think is appropriate under
22 Section 2.

23 Judge Keenan asked to what extent should we consider
24 Section 2 and the Court should pay attention to Section 2, but
25 none of the proposals before the Court present Section 2

1 concerns.

2 JUDGE KEENAN: You are not taking issue with the fact
3 that, for example, District 77 is -- what? -- 40-point-some
4 percent and that there may be one other that's well under 45?
5 You are not take --

6 MR. HAMILTON: Correct, I am not. In fact, I think
7 Dr. Grofman specifically analyzed that and looked at the
8 analysis provided by Dr. Palmer and Dr. Handley and concluded
9 that there was an ability to elect candidates of choice of the
10 African-American community, so there was no problem with vote
11 dilution. So that addresses that issue. Judge Payne, you also
12 asked do any of the districts affect District 75.

13 JUDGE PAYNE: Any of the alternatives, plans.

14 MR. HAMILTON: Correct. I'm sorry. The answer is
15 yes, that several of them do. HB 7002 changes District 75
16 boundary, Petersburg 2 does. Both of the plaintiffs' proposed
17 changes do, and, in fact, you have to if you're going to
18 address the Dinwiddie County split -- it's the split between
19 District 75 and 63. So if you address it, you are changing it.

20 But there's no problem with changing that. I don't
21 think anybody standing before this Court has questioned the
22 power of the Court, indeed the duty of the Court to modify
23 boundaries to remedy the constitutional violation that we have,
24 and --

25 JUDGE PAYNE: It's not any different than any other

1 constitutional district.

2 MR. HAMILTON: You took the words exactly right out
3 of my mouth, so I'll stop talking on that point. Ms. McKnight,
4 I just want to address a couple points she made. First, you
5 absolutely do have to make a credibility, adverse credibility
6 determination as to Dr. Grofman --

7 JUDGE PAYNE: I think she acknowledged that, didn't
8 she?

9 MR. HAMILTON: I think in the end, because Dr.
10 Grofman so clearly testified today in open court about his
11 methodology which is exactly the same methodology that he used
12 in the *Personhuballah* case. I think the Court adopted his map
13 there. I think the Court should adopt the map here. I don't
14 think that anything that has been advanced makes any of that
15 suspect.

16 Ms. McKnight also raised concerns about disrupting
17 voter expectations. I think we can spend a lot of time looking
18 through the *Shaw* jurisprudence and we won't see that a
19 legitimate factor once the Court has found a constitutional
20 violation of the 14th Amendment and is faced with the task, as
21 this Court is, of unwinding that impermissible constitutional
22 violation.

23 There may be lots of voters in the other districts
24 that were not challenged that had -- that are living in
25 districts and have been living in districts and voting in

1 districts over the course of much of the last decade in what we
2 now know are unconstitutional districts. Their expectations,
3 I'm sorry, whatever they may have, but those expectations are
4 not a factor this Court should be considering.

5 What this Court should be considering is the
6 violation of the 14th Amendment that was inflicted upon the
7 state by the state legislature and an appropriate remedy for
8 it. The Court has several appropriate alternatives to remedy
9 that violation, and I urge the Court to adopt one.

10 JUDGE PAYNE: How to we consider, or what, if any,
11 consideration do we give to the evidence about BVAP in deciding
12 the remedy in this case? You said you thought it's appropriate
13 to consider in assessing Section 2 of the Voting Rights Act,
14 but how does that work? I'm not quite sure I understand that.

15 MR. HAMILTON: Precisely the same way Dr. Grofman
16 considered it. He drew the districts using and applying
17 traditional redistricting criteria. Then he looked at is there
18 vote dilution, an ability to elect here among -- in these
19 districts, or have we accidentally backed into a situation in
20 which we've completely diluted the vote and committed the what
21 would be hugely ironic and sorry situation in which in
22 remedying one constitutional violation we stripped the
23 effective franchise from African-American voters in the
24 Commonwealth. That is not the task before the Court, and I
25 think --

1 JUDGE PAYNE: Serves a function of a verification
2 process.

3 MR. HAMILTON: Correct. Thank you, Your Honor.

4 JUDGE PAYNE: Do you have any other questions?

5 JUDGE KEENAN: No.

6 JUDGE ALLEN: No.

7 JUDGE PAYNE: First, while I'm looking for something,
8 there's a motion for attorneys' fees that's been filed and
9 outstanding for a long time. In the *Personhuballah* case, I
10 found, and I think all of us who had to deal with it found that
11 the presence of an outstanding attorneys' fees motion and then
12 another one and then another one created terrible briefing
13 problems. Is there any reason we can't deny your petition for
14 attorneys' fees without prejudice to the filing of it at the
15 end of the whole case?

16 MR. HAMILTON: Well, I think, Your Honor, perhaps the
17 better approach would be to -- if that's the inclination,
18 rather than grant the motion at this point and then do a
19 supplemental award of attorneys' fees later would be to simply
20 stay the decision on the motion until receipt of the decision
21 from the United States Supreme Court.

22 JUDGE PAYNE: That leaves us with a problem that we
23 had in *Personhuballah* in trying to work through what were the
24 claims and what did they really mean, and the amount of time
25 that was devoted by the judges, the law clerks, and the lawyers

1 to sorting out the question of what were the fees was just
2 enormous, and it made the writing of the opinion a terrible
3 mess for Judge O'Grady.

4 I do remember that, so the way I typically deal with
5 this kind of thing is deny it without prejudice to re-filing it
6 when it's ready to be filed.

7 MR. HAMILTON: Either way, Your Honor. Whatever is
8 most efficient for the Court. We certainly have no interest in
9 making it more difficult for counsel or the Court.

10 THE COURT: We a need a date, I think, for Dr.
11 Grofman to submit a final opinion which, I believe, the Court
12 has decided would like to be in the form of a report but at the
13 end of it verified. Am I correct on that?

14 JUDGE KEENAN: It's really two separate ones, because
15 the first is the corrected compendium of what exists, and the
16 second is tailoring the different modules. Do we want to set a
17 separate date for those two? Do you see what I'm saying? The
18 first one is to have him correct the existing group and file
19 one complete document.

20 JUDGE PAYNE: Right.

21 JUDGE KEENAN: The second one would be once we -- if
22 we do adopt the Grofman tailoring --

23 JUDGE PAYNE: Yes, okay, the tweaking. We will need
24 a report that straightens everything out that has been in
25 the -- identified in the various addenda and puts it all

1 together in one report. Then if we use Dr. Grofman's modules,
2 we will then need to tender to him this is our choice, what, if
3 any, tweaking needs to be done to adjust it, get a second
4 report that addresses that question, and then give the parties
5 an opportunity to review it and say whatever they've got to say
6 on that; is that correct? So how long will it take you, in
7 your judgment, Dr. Grofman, to get the first one done?

8 DR. GROFMAN: If I may briefly address the Court.
9 Certainly it would be very quick for me to provide to the Court
10 and to the parties a full and corrected and complete version of
11 my December 7th report incorporating any corrections, typos and
12 the like, that are found in later documents. That's relatively
13 straightforward. Two or three days.

14 JUDGE KEENAN: Dr. Grofman, if I could interject
15 here. But we are interested in essentially a publication
16 quality document. In other words, a document that encapsulates
17 everything so the addenda are now part of the single document
18 so we'll have a record for the Supreme Court to look at
19 without, perhaps, having a problem knowing exactly what we
20 relied on.

21 DR. GROFMAN: That is exactly the way I interpreted
22 Judge Payne's comments and your --

23 JUDGE PAYNE: We will end up with a complete report.

24 DR. GROFMAN: Yes. That can be done in a very short
25 window. Three days.

1 JUDGE PAYNE: Three days is not very likely. I would
2 say within a week.

3 JUDGE KEENAN: And attested, attestation.

4 JUDGE PAYNE: Take a week and get it done, make sure
5 you are satisfied. If you have a problem, you need to let us
6 know, and it will be tendered in the form that you did it, but
7 at the end of it, it would be attested to as a sworn document.

8 DR. GROFMAN: Thank you, Judges, for clarifying what
9 my task would be in the remaining time. I'm happy to, of
10 course, do whatever it is that the Court requires me to do in
11 order to help them provide a complete remedy map.

12 The question that I had for the Court is that given
13 that there are alternative modules and given that various
14 parties have expressed preferences among the various modules,
15 it would be essential for me, at least I believe it would be
16 essential for me, rather than for me to simply indicate that as
17 special master this is my preference among the modules and for
18 a complete plan, for the Court to give me guidance as to which
19 of the modules the Court wishes me to perfect.

20 JUDGE KEENAN: I think we'll do that, Dr. Grofman.
21 We will do that -- should we adopt that course of action, we'll
22 do that after you submit your publication quality compendium of
23 everything you've done so far.

24 DR. GROFMAN: Fine.

25 JUDGE PAYNE: And then we will say does it need to be

1 adjusted, if it does, you adjust it. Then the parties will
2 have a copy of it, and they will have a right to comment upon
3 it.

4 DR. GROFMAN: I believe I understand that three-step
5 process.

6 JUDGE PAYNE: You will hear from us as to what our
7 preference is.

8 DR. GROFMAN: Exactly. I believe that can be done in
9 an expeditious fashion, Your Honor.

10 THE COURT: That's the second test. That's an
11 entirely different date. Is there anything else that needs to
12 be done at this time? All right, we will be in adjournment.
13 Thank you very much. The matter is submitted.

14
15 (End of proceedings.)
16
17

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.
20
21

22 /s/
23 P. E. Peterson, RPR

Date